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1925.

THE

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Probate Division.

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AND ON APPEAL THEREFROM IN THE

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ALSO DECISIONS IN THE

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE ARCHES COURT OF CANTERBURY.]

ON APPEAL FROM THE CONSISTORY COURT OF LONDON.

1924
July 15;
Oct. 21.

WALTER CHARLES WILLIAMS VINCENT *v.* THE RECTOR OF THE UNITED BENEFICE OF ST. MAGNUS-THE-MARTYR, ST. MARGARET, NEW FISH STREET, AND ST. MICHAEL, CROOKED LANE, AND THE CHURCHWARDENS OF THE PARISHES OF ST. MAGNUS-THE-MARTYR, ST. MARGARET, NEW FISH STREET, AND ST. MICHAEL, CROOKED LANE.

Ecclesiastical Law—Faculty—Discretion—Isolated Crucifix on Column—Figure of St. Mary with the Holy Child in Reredos—Second Holy Table—Worship or Adoration contrary to the Twenty-second Article—Illegality.

On the hearing in the Consistory Court of London of a petition as to the furniture and fittings of the Church of St. Magnus-the-Martyr, in the City of London, a faculty was granted for (amongst other things): (1.) a second Holy Table; (2.) an image of the Virgin and Holy Child placed behind

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VINCENT v. ST. MAGNUS THE MARTYR, ETC. (RECTOR AND CHURCHWARDENS).

the second Holy Table; and (3.) a crucifix fixed to a pillar at a considerable height from the floor and near the pulpit. On appeal the Court of Arches dismissed the appeal as to (1.) and (3.) but allowed it as to (2.):—

Held, that the law is the same for every kind of sacred image in a church, including a crucifix or rood, and that although such an image is not illegal per se, it cannot lawfully be placed in a church without a faculty. On an application for such a faculty, the question to be considered is whether, if the faculty be granted, there is or is not, in the particular case, a danger of the image being used for purposes of worship or adoration condemned by the Twenty-second Article of Religion. After discussion of the kind of evidence proper to this inquiry:—

Held, that there was a danger of the proposed image of the Virgin and Holy Child being so used.

Held, also, that an image used for purposes of worship or adoration is an ornament and is illegal, because not included amongst the ornaments of the Church sanctioned by the Ornaments Rubric in the Book of Common Prayer.

Held, also, that a faculty authorizing the erection of an image in a church should not be absolute, but until further order.

Vicar and Churchwardens of St. John, Pendlebury v. *Parishioners of the Same* [1895] P. 178 approved.

Vicar of Richmond and Chapelwardens of St. Matthias, Richmond v. *All Persons having Interest* [1897] P. 70 overruled.

No order as to costs.

THIS was an appeal from the Consistory Court of London.

On December 24, 1923, a petition on behalf of the Rev. H. J. Fynes Clinton, Rector of the United Benefice of St. Magnus-the-Martyr, St. Margaret, New Fish Street, and St. Michael, Crooked Lane, in the City of London, and of the churchwardens of the parishes of St. Magnus-the-Martyr, St. Margaret, New Fish Street, and St. Michael, Crooked Lane, was filed in the Registry of the Consistory Court of London, praying the Court to decree a faculty authorizing the petitioners to carry out the following works: (1.) the enlargement of the sanctuary; (2.) the substitution of wooden candlesticks of more appropriate design for certain existing brass candlesticks upon the Holy Table, and the placing on the Holy Table of a cross of carved mother-of-pearl; (3.) the raising and restoration of the reredos, which had been much mutilated, and the completion of its upper stage by the addition of the ordinary rood figures; carved figures of the patron saints of the combined parishes and of the chapelry of

St. Thomas-on-the-Bridge being used as decorations on the four columns of the sanctuary; (4.) two additional Holy Tables to be placed across the angles of the north and east and south and east walls of the aisles; (5.) retables to these additional Holy Tables to be constructed as to one from the wood of the original interior porch, which had been used for many years for other purposes; and as to the other from the two outer wings of the existing reredos; a carved figure of St. Mary and the Holy Child to be placed in a recess in the retable of the north Holy Table and a picture or statue of our Lord in the retable of the south Holy Table; (6.) the replacement with plate leaded glass of the glass of two windows; (7.) the substitution of open benches for the existing high box pews; (8.) the restoration of the pulpit as far as possible to its original condition, and the placing of a crucifix on the column opposite to the pulpit; (9.) the removal of the font to its original position; (10.) improvements in the lighting of the church; (11.) the hanging of pictures on the walls commonly called the Stations of the Cross; (12.) the hanging of an Icon of St. Mary and the Holy Child in some suitable place. The carrying out of all the above works was approved by the Parochial Church Council by a unanimous resolution passed on October 29, 1923.

Citation issued on January 10, 1924, and on or about January 29 an appearance in opposition was entered on behalf of Walter Charles Williams Vincent, a parishioner, who by his answer objected to all the proposed works except those numbered (2.), (6.), (7.), (8.) so far as relates to restoration of the pulpit, (9.) and (10.).

The suit was heard by the Chancellor of the Diocese of London (F. H. L. Errington, Esq.) on March 29, 1924, when witnesses were examined, and judgment was given on April 12. A faculty was granted in respect of all the unopposed items. In regard to the opposed items a faculty was granted for the enlargement of the sanctuary; for the raising and restoration of the reredos and the placing of the rood figures and the figures upon the columns; for the south Holy Table and retable together with the carved figure of St. Mary and the

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VINCENT v. ST. MAGNUS THE MARTYR, ETC. (RECTOR AND CHURCHWARDENS).

Holy Child, but not for the north Holy Table, for which the Chancellor held that no necessity had been shown; for the crucifix on the column opposite the pulpit; and for the Icon of St. Mary and the Holy Child, but the Chancellor refused a faculty for the hanging of the pictures commonly called the Stations of the Cross.

Walter Charles Williams Vincent appealed from so much of the Chancellor's decision as directed the issue of a faculty for the erection of the south Holy Table, the carved figure of St. Mary and the Holy Child and the crucifix on the column opposite to the pulpit. There was no cross-appeal.

1924. July 15. The appeal was heard before the Dean of the Arches (SIR LEWIS DIBDIN, D.C.L.).

Ernest Charles K.C. and *Wilfred Lewis* for the appellant. An isolated crucifix is illegal in itself. It is not an ornament within the Ornaments Rubric.

[THE DEAN OF THE ARCHES. Why not? What is an ornament?]

Something you may legally use as an adjunct to public worship. Nor can it be regarded as a mere architectural decoration, as a crucifix with attendant figures has been regarded. Crucifixes were absolutely excluded from churches by 3 & 4 Edw. 6, c. 10.

[THE DEAN OF THE ARCHES. That Act is spent.]

That may be; but to justify the reintroduction of crucifixes after the prohibition contained in that Act a subsequent express authorization must be shown: the mere absence of a continuing prohibition is insufficient.

[THE DEAN OF THE ARCHES. If that argument be sound all images in churches are prohibited.]

The crucifix was the most abused of all images.

[THE DEAN OF THE ARCHES. Is the statute 3 & 4 Edw. 6, c. 10, the only prohibition of crucifixes?]

Yes.

[THE DEAN OF THE ARCHES. Do you rely on the Twenty-second Article of Religion?]

The Article supposes and prohibits worship of images, but we

rely on it as inferentially forbidding the presence of a crucifix which could be worshipped.

Although there is no decision of an Appellate Court directly deciding that a crucifix is illegal, in the reported cases a clear distinction is taken between crucifixes and crosses, and the latter only are held to be lawful: *Liddell* v. *Westerton.* (1)

[*Hansell.* In *Liddell* v. *Westerton* (2) the cross is considered not to be an image. (2)]

[They also referred to *Phillpotts* v. *Boyd* (3); *Clifton* v. *Ridsdale* (4); *Ridsdale* v. *Clifton* (5); *Hughes* v. *Edwards* (6); *In re St. Anselm, Pinner.* (7)]

Supposing, however, that the Chancellor had a discretionary power to grant the faculty, he has exercised it wrongly in this case, and has indeed entirely overstepped it. He says the crucifix and figures will not necessarily be used superstitiously. This is not the proper test: the test is whether such user is probable: per Lord Penzance in *Clifton* v. *Ridsdale.* (8) Having regard to the services and ceremonial proved to have been customary in this church such user is extremely probable; and this alone should have prevented the exercise of any discretion in favour of the rector. If the rector desires the crucifix, as he said he did, as a help and inspiration to the preacher, this in itself involves superstitious reverence within Lord Penzance's definition: *Clifton* v. *Ridsdale.* (8)

Hansell and *Shebbeare* for the respondents. It is for those who allege the illegality of the crucifix to prove it. No statute or appellate decision to that effect is or can be cited. The legality of crucifixes, whether isolated or with attendant figures, is to be judged by the same tests as apply in the case of any other image, and that the law is so is expressly stated by Lindley L.J. in *Reg.* v. *Bishop of London.* (9) Moreover if a crucifix is per se illegal the greater part of Lord Penzance's judgment upon the subject in *Clifton* v.

(1) Moore's Special Report.
(2) Moore's Special Report, pp. 162 et seq.
(3) (1875) L. R. 6 P. C. 435.
(4) (1876) 1 P. D. 316, 350.
(5) (1877) 2 P. D. 276.
(6) (1877) 2 P. D. 361.
(7) [1901] P. 202, 220.
(8) 1 P. D. 316, 351 et seq.
(9) (1889) 24 Q. B. D. 213, 237.

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Ridsdale (1) was unnecessary. The attempted distinction between an isolated crucifix and a crucifix with attendant figures is not merely unsupported by authority, but is in itself unreasonable and incapable of justification. The crucifix with the attendant figures of St. Mary and St. John represents one episode in the drama of the Crucifixion, and that an episode of comparatively short duration. The crucifix without such attendant figures represents the central figure of the whole drama, and not merely one episode in it. It is impossible to conceive a principle whereby the episode may lawfully be represented but not the whole drama.

[THE DEAN OF THE ARCHES. Where, apart from decisions, am I to find the law as to images ?]

The common law of the Church permitted images. The common law has been modified only by the statute 3 & 4 Edw. 6, c. 10, and the Twenty-second Article of Religion. The statute is now spent, and the Twenty-second Article is confined to cases of abuse of images. Apart from such cases, the common law applies, and it has not been altered. With respect to the allegations of superstitious reverence and abuse in this case, the Chancellor heard and saw the witnesses, and these allegations were gone into and were clearly present to his mind when he gave his judgment. He directed himself properly in relation to them, and no ground is shown for interfering with the exercise of his discretion. But supposing it to be held that superstitious reverence has in fact been paid to the figure of St. Mary now in the church, the figure of St. Mary and the Holy Child proposed to be substituted for it will have the effect of reducing the danger of such reverence being paid in the future. The existing figure is movable and isolated : the proposed figure will be a figure fixed in the reredos : it could not be carried in procession. Further, it is a figure of St. Mary with the Holy Child, as to which it cannot be said that it is capable of encouraging worship addressed elsewhere than to our Lord Himself.

Charles K.C. in reply.

Cur. adv. vult.

(1) 1 P. D. 316, 350–359.

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1924. Oct. 21. THE DEAN OF THE ARCHES read the following judgment: This case comes to the Court of Arches on appeal from the Consistory Court of London. A petition was presented to that Court by the rector and churchwardens of St. Magnus-the-Martyr in the City of London and of two other parishes with which St. Magnus is united. The petition prayed a faculty to authorize extensive alterations in the internal arrangements of the church and the introduction of various objects by way of additions to its fittings. The petition was opposed by Mr. Vincent, a parishioner of one of the united parishes and till recently a churchwarden of St. Magnus. The learned Chancellor decided to grant a faculty in respect of some of the matters sought and refused to do so in respect of others. Amongst the former the Chancellor allowed a second Holy Table, a figure of the Virgin and Child of considerable size to be fixed on a ledge at the back of the second Holy Table, and a small crucifix to be fixed to a pillar near the pulpit at a height of about eleven feet from the ground. Mr. Vincent has appealed against the decision of the learned Chancellor in respect of these three things.

I take the figure of the Virgin and Child and the crucifix first.

During the last seventy years there have been many and not always consistent decisions in the Ecclesiastical Courts as to the lawful and unlawful use of images. But the difficulties attending the subject are of very much longer standing. The tendency which, explain it how we may, seems deeply rooted in human nature, to adopt some material object for worship, has always been in evidence from the days when the Second Commandment was given till to-day. In the first centuries of the Christian era the Church sternly prohibited the introduction of images, especially representations of our Lord, into churches. The reaction against Pagan idolatry made this almost inevitable. Later on, when in the West images became familiar objects in churches, the great Iconoclast controversy showed how profoundly the subject agitated the minds of men. By the sixteenth century the Latin Church had settled down to a system of image worship, which was

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generally recognized. Thus the Missal itself contains the service of Veneration of the Cross on Good Friday, in which the priest proclaims "Ecce lignum crucis" and the choir answer "Venite Adoremus." The schoolmen defended veneration of images generally and busied themselves in defining the precise kind of adoration to be offered to images of our Lord. St. Thomas Aquinas particularly took the extreme view that the same degree of worship (latria) was due to the representation of our Lord as to our Lord Himself. Others thought differently, but all held that images whether of our Lord or of saints were to be worshipped and adored in memory and honour of those the images represented. (1) The English Provincial Constitutions of Archbishop Arundel (1408) emphatically urge "that the cross and the image of the crucified and the rest of the images of the saints in memory and honour of them whom they figure, ought to be worshipped with procession, bendings of the knee, bowings of the body, incensings, kissings, offerings, lightings of candles and pilgrimages, together with all other manners and forms whatsoever as hath been accustomed to be done in our predecessors' times." (2) At the Reformation the question of images obviously had to be dealt with. After efforts to get rid of images that had been abused, and those only, the attempt to discriminate was abandoned, and by 3 & 4 Edw. 6, c. 10, all then existing images in churches other than those on tombs were to be defaced and destroyed. But the Act enacts nothing as to the future. After the reaction under Mary was over and Elizabeth came to the throne, the question again became urgent. The Queen's Injunctions (3) directed the removal and destruction of all "monuments of superstition," and on these injunctions Articles of Visitation were issued, which inquired as to undefaced images in churches or houses. By administrative action of this sort the churches were practically emptied of images, and special care

(1) Decretum, 3rd pt., Distinctio III., cap. 28, Venerabiles imagines.

(2) Lyndwood's Provinciale V. De hæreticis, cap. Nullus quoque (Ed. 1679), p. 297, trans. Johnson's English Canons (A. C. L.), vol. ii., p. 469.

(3) Cardwell's Doc. Ann., vol. i. p. 221 (Ed. 1844).

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was taken to require the removal of rood lofts. On the other hand a proclamation was put forth (1) forbidding the destruction of figures erected in memory of deceased persons and distinguishing between such monuments and "monuments of idolatry," which were to be destroyed. Archbishop Parker and other bishops desired to go further, and they addressed a long reasoned appeal to the Queen (2) urging the removal of all images from churches, and insisting in very strong terms that this was essential to the success of their ministry. The homily "Against Peril of Idolatry" contained in the second Book of Homilies issued in 1562 pleads emphatically for the entire abolition of images irrespective of actual abuse. Nevertheless it was not done, and on the contrary the Twenty-second Article of Religion, as revised and ratified in 1563, did not condemn altogether the presence of images in churches, but only "the Romish doctrine concerning . . . . worshipping (veneratione) and adoration of images" as "a fond thing vainly invented and grounded upon no warranty of scripture but rather repugnant to the word of God." So matters have stood ever since.

In order to understand the Twenty-second Article we must have regard to the Latin form in which it was issued in 1563 and to the Latin and English forms in which it received the sanction of the Queen and Convocation in 1571. "The Romish doctrine concerning . . . . worshipping and adoration . . . . of images" is rendered in Latin: "Doctrina Romanensium . . . . de veneratione et adoratione . . . . Imaginum." It has been alleged that "Romanensium" was intended to refer only to the views of some extreme mediæval party in the Roman Church, but research gives no support to this view, but rather shows that the word "Romish" used by the translators is fully justified. "Romanenses" though not the most usual was not an uncommon expression in the sixteenth and seventeenth centuries, and "doctrina Romanensium" denoted the current Roman teaching of the day. Thus Jewel in his Apology uses the words "episcoporum

(1) Cardwell's Doc. Ann., vol. i., p. 289 (Ed. 1844).

(2) Archbishop Parker's Correspondence, p. 79 (Parker Society).

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Romanensium" (1), and in Lady Anne Bacon's contemporary translation, perused and "without alteration allowed" (2) by Archbishop Parker, who was responsible for the word in the Article, and by Jewel, they are rendered "Bishops of Rome." Even if "Romanenses" was sometimes used in a limited sense and sometimes in the general sense, it would still be necessary to construe it in the latter sense in the Twenty-second Article, because in that Article it certainly means "Romish," its English equivalent according to the men who wrote both words. "Romish," it is clear from Archbishop Parker's own letters for example, denoted Roman or Roman Catholic. What was the current view in the Church of Rome as to the worship of images in 1562 has already been indicated. The words "worshipping and adoration" or "de veneratione et adoratione" are no doubt purposely comprehensive, and include the more moderate as well as the more extreme Romish theories of the kind and degree of the worship to be offered to images, so that the questions as to whether latria or dulia or hyperdulia ought to be rendered do not arise. All alike are included in the condemnation of the Twenty-second Article. The decree of the Council of Trent on this subject was not issued till after the Twenty-second Article was published, and therefore could not have been directly referred to. But it seems probable, as indeed is stated by a learned Roman Catholic writer (3),

(1) Jewel's Apology, pp. 45, 105 (Parker Society); see also Andrewes' Tortura Torti (1606), p. 98 (A. C. L.); Responsio ad Bellarminum (1610), p. 438 (A. C. L.); Bishop W. Forbes' Considerationes Modestæ, etc. (1633), passim, 2 vols. (A. C. L.); Defensio, etc., by Crakenthorp (1625), cap. LXVI., p. 435 (A. C. L.). In W. M. L. De Wette's Collection of Dr. Martin Luther's Briefe examples of the use of the word will be found in vol. i., pp. 465, 470, 486, 487, and vol. v., p. 610. Compare also Epistolæ U. Hutteni, edited by Böcking, vol. i., p. 425.

(2) Jewel's Apology, p. 51 (Parker Society).

(3) Canon Waterworth's Canons, etc., of Council of Trent, p. ccxxxviii.: "As regards dogma but little remained to be considered; as the questions . . . . of the use of images had been already sufficiently explained in previous Councils; and it would therefore be sufficient to state those doctrines briefly and to correct the abuses that had in any way obscured them in practice; a decree however of the Sorbonne exhibited by the Cardinal of Lorraine on the question of images gave great satisfaction."

that the decree merely made authoritative what was already the received teaching of the Roman Church.

The task of the ecclesiastical judge when asked to sanction the introduction of an image into a church is not therefore the simple one of applying an inflexible rule of exclusion, but he has to consider whether if he grants the faculty there is or is not, under the circumstances of the particular case, a danger, and, if so, what degree of danger, of the image being used for purposes condemned in such emphatic terms by the Twenty-second Article. The Twenty-second Article makes no distinction between one image and another. There is no ground for regarding a rood differently from other images, as if it were in a separate category of its own. The law is the same for every image, whether it be a crucifix, or a figure of the Virgin Mary or of some other person, whether it stand alone or with other figures and whether it be large or small. It is obvious that some images are more liable to abuse than others. Figures of our Lord are probably most likely of all to be worshipped or adored contrary to the Twenty-second Article. In some positions in a church, such as in a reredos or on a chancel screen, by reason of historical association or mere conspicuousness, images may acquire a significance which in other positions they would not possess. But matters of this sort, while they will be weighed by the judge in considering the application of the law to the particular case—and sometimes they are very important—do not in the least affect the one rule which it is his duty to apply in all cases—namely, whether under the actual circumstances proved before him the faculty can be granted and the image introduced consistently with and in strict loyalty to the Twenty-second Article.

It must also be borne in mind that time is an important element to be considered in the application of this rule. The probability of the abuse which the Article condemns has varied greatly at different periods. Just as at the dawn of the Christian era it seemed essential to exclude all images, so at the Reformation it was found necessary, having regard to the then existing state of things, to make almost a clean sweep

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of images. In the same way fifty or sixty years ago, when roods seemed a startling novelty in the Church of England, it might well seem inevitable that if they were allowed they would lead to the practices condemned by the Twenty-second Article. But now after half a century's experience of many churches in which, rightly or wrongly, roods have been erected, we know that the apprehensions of the past have been to a large extent falsified. I do not mean that roods have not been used in some cases against the spirit and letter of the Twenty-second Article, but that that is not the inevitable result of their erection is clear from other and I believe much more numerous instances. That is a consideration which it is necessary to remember both in studying decisions given many years ago and in deciding cases to-day.

The evidence from which the veneration or adoration of an image will be held actually to exist or to be so probable as to constitute a real peril of abuse, will vary greatly both in its substance and in the way it will strike the minds of different judges. While on the one hand it would be credulous to disregard all acts and words of devotion which are not addressed in set terms to the image, on the other hand it would not be right to attach great weight to momentary acts and gestures, such as bowing to an image or crossing oneself. The matter complained of should be deliberate and definite and very clearly connected with the image ; and in considering its significance, since it is impossible to be sure of a man's thoughts, the test must to a large extent be—what would be the reasonable inference drawn by bystanders from what they saw and heard.

It is not desirable, even if it were possible to do so, to state all the matters to which regard ought to be had in considering applications for faculties for images in churches. They will vary greatly in different cases. But there can be no doubt that the character of the services and ritual of the particular church and its decorations and appearance ought to be made known to the Court, and may be very material in arriving at a just conclusion as to the probability of abuse. On the other hand it must be remembered that with a change of

incumbent there may be a complete revolution in all these matters. It is therefore important that if a faculty for an image is granted it should not be absolute, but until further order only, so as to prevent technical difficulty arising, in the event of an application to remove the image on the ground that it had come to be used for purposes condemned by the Twenty-second Article. It is perhaps hardly necessary to add that in no circumstances should an image be erected in a church without the previous sanction of a faculty.

I have thought it well to state what I conceive to be the correct view of the law as to images in churches apart from the numerous decided cases on the subject. But I now proceed to deal with them.

Westerton v. *Liddell* (1) established the legality of the cross if used merely as a decoration and not as an "ornament" in the technical sense, but decided nothing as to crucifixes or other images, though a distinction was drawn between crucifixes and crosses.

The leading authority is *Phillpotts* v. *Boyd* (2), in which the Judicial Committee of Privy Council had to decide as to the legality of the reredos in Exeter Cathedral. Their Lordships laid down the principle which I have endeavoured to state in my own words, and, applying it to the case before them, they decided that there was no peril of a breach of the Twenty-second Article. The subject of the sculpture was a group representation of the Ascension, and it was, as I have said, a reredos.

In *Clifton* v. *Ridsdale* (3) the question arose, first in this Court and then in the Judicial Committee, as to a rood erected on a chancel screen. Lord Penzance proceeded on the principle laid down in *Phillpotts* v. *Boyd* (2) and came to the conclusion that having regard to past history, a crucifix, placed as it was in the case before him, was liable to abuse in the future, and therefore ought not to be allowed. He was speaking in 1876, and expressly stated (4) that when

(1) Moore's Special Report.
(2) L. R. 6 P. C. 435; (1874) L. R. 4 A. & E. 297.
(3) 1 P. D. 316; 2 P. D. 276.
(4) 1 P. D. 353, 354.

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a proposal was made to sanction the restoration of a crucifix "to that place in our churches to which for 300 years it has been a stranger," "the best forecast of the future . . . . is to be obtained from the experience of the past." It is important to bear in mind that Lord Penzance did not attempt to place a crucifix or a crucifix on a rood screen in any special category apart from other images. On the contrary he says: "Indeed, I doubt whether any narrower or more exact definition of what is lawful and what unlawful, can, for practical purposes, be framed, than that which is set forth in the case of *Phillpotts* v. *Boyd*" (1)—i.e., the danger of worship or adoration contrary to the Twenty-second Article. In other words his decision was based on the circumstances before him, and especially the necessity of guessing what might be the result of the replacement of a long disused object, with a history behind it. As I have already said, we have now half a century's experience on which to form an opinion, and it would be absurd if we were to disregard that experience and act instead on the forecast of fifty years ago. The Judicial Committee affirmed the decision of Lord Penzance and specifically on his ground that the history of the rood created the apprehension that the old abuses would follow its revival. Lord Penzance, a few months after *Clifton* v. *Ridsdale* (2) was decided, heard another case of the same kind: *Hughes* v. *Edwards* (3), which raised the question of the legality of a panel containing a representation of our Lord on the Cross in high relief, to be inserted as the centre of a reredos having St. John and the three Marys on either side. Lord Penzance granted the faculty, so that it is plain that his Lordship did not regard his decision in *Clifton* v. *Ridsdale* (2) as prohibiting roods altogether. With regard to its position behind the Holy Table instead of on a chancel screen, it is well to remember that the Reformers, who were of course well accustomed to the aspect of churches before the change, regarded the presence of images over the Holy Table as specially objectionable. Thus Archbishop Parker and other

(1) 1 P. D. 358.

(2) 1 P. D. 316; 2 P. D. 276.

(3) 2 P. D. 361.

bishops wrote in the letter to Queen Elizabeth already mentioned (1): "But to set [images] in churches . . . . and that over the Lord's Table, being the highest and most honourable place where most danger of abuse hath, is and ever has been," etc.: see also Ridley's Treatise concerning images. (2) I do not think, therefore, that it is allowable to draw a solid distinction between a rood on the chancel screen and behind the Holy Table, as if what is legal in the latter position is illegal in the former. Both fall under the same principle, and must be subjected to the same test. *Re St. Anselm, Pinner* (3), was a decision of my learned predecessor Sir Arthur Charles, in which he took the view I have stated as to *Clifton* v. *Ridsdale* (4), and granted a faculty for a rood and figures on a chancel screen.

I have discussed the case of *Clifton* v. *Ridsdale* (4) fully, because it undoubtedly presents difficulties and has seemed to many Chancellors to place roods on rood screens under a special ban of illegality, which does not extend to other images or even to roods not placed on rood screens. I took this view in *Vicar of Richmond and Chapelwardens of St. Matthias, Richmond* v. *All having Interest* (5), but for the reasons I have given I think I was wrong.

The number of reported cases in the Consistory Courts is large. (6)

(1) Archbishop Parker's Correspondence, p. 79 (Parker Society).

(2) Parker Society, p. 90.

(3) [1901] P. 202.

(4) 1 P. D. 316; 2 P. D. 276.

(5) [1897] P. 70.

(6) *In re St. Lawrence, Pittington* (1880) 5 P. D. 131; *Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *Rectors, etc., of the Same* [1895] P. 71; *Vicar and Churchwardens of St. John, Pendlebury* v. *Parishioners of the Same* [1895] P. 178; *Rector and Churchwardens of Barsham, Suffolk* v. *Parishioners, etc., of the Same* [1896] P. 256; *Vicar and Churchwardens of Great Bardfield* v. *All having Interest* [1897] P. 185; *Vicar of Richmond and Chapelwardens of St. Matthias, Richmond* v. *All having Interest* [1897] P. 70; *In re St. Mark's, Marylebone Road* [1898] P. 114; *Kensit* v. *Rector and Churchwardens of St. Ethelburga, Bishopsgate Within* [1900] P. 80; *Vicar and Churchwardens of Paignton* v. *All having Interest* [1905] P. 111; *Markham* v. *Vicar, Churchwardens, etc., of Shirebrook* [1906] P. 239; *Vicar and Churchwardens of St. John the Evangelist, Clevedon* v. *All having Interest* [1909] P. 6; *Vicar and Churchwardens of St. Paul, Bow Common* v. *Inhabitants of the Same* [1909] P. 245; *In re St. Stephen, Hampstead* (1912) 28 T. L. R. 584;

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The decisions differ greatly, but all or nearly all of them are based upon a consideration whether in the particular case there is or is not danger of abuse. The main difference is that while some Chancellors have considered themselves bound to hold that a rood on a chancel screen rendered that danger inevitable, others have felt themselves free to consider the particular circumstances of each case. I think the law both on principle and on the authorities cannot be better stated than in the following extract from the judgment of Chancellor P. V. Smith in *Vicar and Churchwardens of St. John, Pendlebury* v. *Parishioners of the Same* (1): "It appears that the sole test which now governs the legality or otherwise of figures in churches is whether or not they are free from the imputation or the risk of being abused by becoming the objects of adoration or superstitious reverence. Whether they are represented in stained glass, wood or stone; whether they are painted, or in bas-relief, or completely formed; whether they are in groups, historical or otherwise, or stand as independent statues—whatever be their position in the sacred edifice, and whatever may have been the intention or object in erecting them, they will all be tried by this one test, and by no other."

There is another and more technical way in which the legality of any particular image in a church may be tested. If an image is made an object of veneration or adoration in a service, the image becomes an "ornament of the Church"—that is, something used pro quocumque apparatu seu instrumento: *Liddell* v. *Westerton*. (2) But the Ornaments Rubric restricts lawful ornaments of the Church to those mentioned in the First Prayer Book of Edward VI. or subsidiary to them: and images are neither the one nor the other. It is with reference to this point that it

In re Hendon Parish Church (1912) 28 T. L. R. 438; *Hudson* v. *Fulford* (1913) 30 T. L. R. 32; *Vicar and Churchwardens of All Saints', Westbury* (1914) 30 T. L. R. 389; *In re Tenbury Parish Church* (1920) 36 T. L. R. 188; *Field* v. *Ommanney* (1920) 36 T. L. R. 645; *In re St. Luke's, Southport* (1920) 36 T. L. R. 733.

(1) [1895] P. 178, 181.

(2) Moore's Special Report, p. 156.

has been held again and again that images can only be justified as "decorations" or "architectural decorations." While fully appreciating the decisive character of this argument, so long as the Ornaments Rubric remains a part of our Ecclesiastical Law, I have thought it desirable to consider the matter from the broader point of view of principle.

It remains to apply the law as I understand it to the facts of this case.

At my suggestion the rector of St. Magnus gave evidence on the hearing of the appeal, and in answer to my inquiries I learnt what is actually done at present and what is contemplated to be done in the future, in this church so far as matters relevant to this application are concerned. The facts were not, I think, judging from the learned Chancellor's notes of evidence, so fully before him.

First as to the figure of the Virgin and Child.

It appears that for some time past there has been a small figure of the Virgin on a shelf, close to the position in which it is proposed to place this much larger image. Near the present figure—a little to one side of it—is what is described in the evidence as a "shrine," and that is the place where it is proposed to place the second Holy Table with the figure of the Virgin and Child behind it as a reredos. So that these would occupy a similar position—though more closely connected with each other—to that of the small figure and shrine. The second Holy Table and figure would be in substitution for the present figure and shrine. The small figure has been placed where it is without authority. There exists in connection with this church a recently formed "Confraternity of Our Lady of Salve Regina," which now numbers about 100 members, all non-parishioners. Its constitution, which is in evidence, states its purpose to be "to promote the honour of God in the Holy Incarnation and the Blessed Sacrament and the Public Veneration of His Glorious Mother in the Church of St. Magnus-the-Martyr." The Confraternity are to achieve this purpose "by the public singing or recitation of the Salve Regina or other anthem of

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our Lady before her shrine daily at the mid-day and evening Angelus."

The Salve Regina is one of four well-known antiphons of the Blessed Virgin. They are all hymns addressed to the Virgin, and one of them is recited by the Confraternity before the "shrine" daily at 1.15 P.M. There are also prayers offered, some of which are addressed to the Virgin—what they are is not in evidence. The rector takes no part in this daily service, except occasionally on great festivals. He is nevertheless responsible. There are at certain times processions in the church at which members of the Confraternity carry candles, and sometimes the small image of the Virgin has been carried in procession. The image of the Virgin and Child would be fixed. There is a stand for votive candles near the shrine, and the rector intends to retain this or another for the same purpose before the second Holy Table. So great is the importance which he attaches to a stand for this purpose that when by the order of the Consistory Court a stand which he had previously introduced was removed by a churchwarden he placed another in the same position and retains it there in defiance of the Court's order. All the anniversaries connected with the Blessed Virgin mentioned in the Prayer Book are observed in this church, especially by the Confraternity; and in addition there are other commemorations—e.g., the Immaculate Conception, the Apparition of the Virgin at Lourdes and the Assumption. If the second Holy Table is allowed with the figure of the Virgin and Child behind it, it is intended that it should be used for many celebrations now solemnized at the principal Holy Table, which hitherto has been the only one. The rector, in answer to a question from me, stated that he wishes and intends to go on with the present services in connection with the Confraternity.

As to the services of the church generally, it seems hardly necessary to say much about them. But I notice that the learned Chancellor in his judgment says: "It is startling to find in a list of services extending over several months that, with the exception of 'Short Evensong,' there is no single service that a parishioner whose education in the technique

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of Churchmanship has been neglected could recognise as a Prayer Book service." The learned Chancellor in allowing the faculty for the objects, the subject of this appeal, says he has gone " to the utmost verge of his discretion," and in doing this he makes a touching appeal to the rector and churchwardens to act in the same spirit and to seek by even a little consideration for the consciences and perhaps prejudices of the people " to reconcile differences between fellow Christians." The learned Chancellor's judgment is dated April 12, 1924—i.e., on the Saturday before Holy Week—and I was anxious to ascertain whether his action had had the result he hoped for. But the list of services held during Holy Week and Easter given in evidence before me shows nothing of the sort. Apparently the rector returned to his church and went on with various services and ceremonies (no doubt previously announced), such as " Exposition of the Blessed Sacrament," " Stations of the Cross," " Mass of the pre-sanctified," " Veneration of the Holy Cross," " Visits to the Chapel of Repose," " New Fire," " Paschal Candle," " Solemn Vespers of the Sacred Heart," " The Dolours," and " The Joys of our Lady," unaffected by the learned Chancellor's words; and in answer to a question from me the rector stated that he did not wish to make any suggestion in the direction contemplated by the Chancellor, and that although he would consider anything proposed by others he desired to continue as at present.

Confining my attention to the evidence before me as to the Confraternity of our Lady and its doings I come to the conclusion that the small image has been the object of veneration contrary to the Twenty-second Article, and that if the large figure of the Virgin and Child were permitted to be introduced, there is so grave a peril of its being similarly abused that it ought not to be sanctioned, and I allow the appeal as to this image.

As to the crucifix near the pulpit, which the rector stated he desired as an aid to recollection, there is no evidence that it is likely to be venerated or adored contrary to the Twenty-second Article, and its position and size render any such abuse improbable. I dismiss the appeal as to this crucifix.

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The other matter of appeal is the second Holy Table. The church holds or will hold between 300 and 400 people, and there are a large number of celebrations every week. In those circumstances it would be a matter of course to allow a second Holy Table, but for the exceptional character of the ceremonial and services of this church. I am not however disposed to interfere with the exercise of the learned Chancellor's discretion in this part of the case. I think there ought to be full plans and particulars of the decorations and fittings of and surrounding the second Holy Table, and that these ought to be subject to the approval of the learned Chancellor and to be specifically included in the faculty. With this intimation I dismiss the appeal as to the second Holy Table.

The learned Chancellor seems to have made no order as to costs, and as the appeal has partly succeeded and partly failed I propose to follow his example.

Solicitors for appellant: *Sharp & Benest.*

Solicitors for respondents: *Francis & Calder.*

A. L.

Distinguished. PREST v. PREST. [1949] 2 All E.R. 790.

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Oct. 14.

Considered PREST v. PREST [1950] P. 63

DIVORCE.

BRAGG *v.* BRAGG.

Applied. ABSON v. ABSON [1952] P. 55

Order for Maintenance of Wife and Children under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 7—*Subsequent Divorce obtained on Petition of Wife—Discharge of Order—Effect of Divorce.*

Dissolution of a marriage by a decree absolute of divorce does not ipso facto discharge a maintenance order previously obtained by a wife under the Summary Jurisdiction (Married Women) Act, 1895. Nor does such dissolution compel the Court of summary jurisdiction to discharge such an order. Every such case comes within the discretion given to the Court by s. 7 of the Act to vary or discharge the order on evidence of fresh facts.

ON August 15, 1919, a wife obtained an order from the stipendiary magistrate at Leeds under the Summary Jurisdiction (Married Women) Act, 1895, whereby her husband was declared to have deserted her and ordered to pay her

17*s.* 6*d.* a week for the maintenance of herself and their children.

On July 27, 1922, the wife obtained from the Divorce Court a decree nisi for the dissolution of the marriage on the ground of her husband's adultery and bigamy; and on February 5, 1923, the decree was made absolute. No order for maintenance of the wife or children had been made or applied for in the Divorce Court.

The husband then took out a summons in the magistrate's Court under the Summary Jurisdiction (Married Women) Act, 1895, asking for the discharge of the order on the ground that it had ceased to be operative, or, if not, ought to be discharged as soon as the parties had ceased to be husband and wife.

The stipendiary magistrate dismissed the summons upon the grounds stated in the following judgment: "The wife of the respondent to a summons taken out by her under the Act of 1895, upon which an order was made, subsequently obtained a divorce from him. The only question I have to decide is whether I should on that ground discharge her order. It was contended on behalf of the husband that I had no option in the matter: that the relationship of husband and wife having ceased there remains no ground on which such an order can be supported, and that it should be discharged under s. 7. That section provides that a Court of summary jurisdiction may, upon cause being shown upon fresh evidence to the satisfaction of the Court, at any time alter, vary or discharge such order. A somewhat similar provision is made by s. 9 of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58). Fresh evidence means evidence of matters that could not with reasonable diligence have been discovered before the order was made, or of matters that have arisen since: per Jeune P. in *Johnson* v. *Johnson*. (1) In this sense the evidence proffered was no doubt fresh evidence. Apart from this, which is a matter of discretion to be exercised judicially, there are two cases in which a Court must discharge an order; that of adultery by the wife after the making of

(1) [1900] P. 19, 21.

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the order, and that of resumption of cohabitation by the parties. In all other matters the Court has a discretion, including, in my judgment, the case of adultery by the wife committed before the making of the order, but discovered within the rule as to fresh evidence afterwards.

"It is not suggested in this case that the order was not properly made, or that any fact has since been discovered which would have prevented the making of it. The objection here falls under a different category—namely, that since the order was made, the wife has become a single woman. It would appear that in this case no alimony was granted by the Divorce Court, or indeed applied for; and I will assume for the purpose of my judgment that, if applied for, it might still be granted there. I do not however think, having regard to the status of the parties, that it could be more conveniently dealt with there, but less conveniently; and I do not therefore consider that the matter of discharging this order could in any way be said to be appropriate to the provisions of s. 7 of the Act of 1895. I find nothing in this Act which limits the effect of an order properly made, or which can be reasonably construed to limit the operation of the order to such time as the applicant is still a married woman. The order being made against the husband for a matrimonial offence, and designed to make provision for his wife and children, I can see no reason why he should be relieved of that responsibility because he has subsequently committed further matrimonial offences upon which the wife has obtained a divorce.

"I am of opinion that the Court has a discretion in these cases, and should not exercise it against a woman who has subsequently obtained a divorce, unless some good cause is shown for such exercise. The husband's advocate was not in a position to show any reason why I should exercise my discretion in his client's favour. I do not think I am bound in law to do so, and I must therefore dismiss the application. Should circumstances arise to show that the operation of the order is unjust, the husband can take out a fresh summons."

The husband appealed.

Frampton for the appellant. The Summary Jurisdiction (Married Women) Act, 1895, only gave jurisdiction to order maintenance to be paid as between husband and wife. When the applicant for maintenance has by her own act put an end to the status of marriage, the jurisdiction is at an end, and the order became ipso facto void.

[HORRIDGE J. Then why move to discharge it ?]

To be on the safe side application is often made to discharge orders which have become ineffective. But if the order still subsists, it ought to be discharged, because the obtaining of the divorce by the wife is a new fact which, if it had existed at the time the order was made, would have prevented the order being made.

H. W. Barnard for the respondent. The husband has been ordered to maintain his wife because he had been guilty of deserting her. It would be absurd if he could be relieved of this obligation because he has committed the further matrimonial offences of bigamy and adultery. The parties are defined in the Act of 1895 as "married woman" and "husband" only to define their positions at the time of the application, and not to limit their rights and obligations to the time for which that status continued. I do not dispute that the divorce was an event which gave the magistrate a discretion to alter his order. But he has exercised his discretion, and, I contend, correctly.

Frampton in reply.

THE PRESIDENT (SIR HENRY DUKE). The learned magistrate gave very careful attention to this case and has given the parties the advantage of a statement in detail of the grounds upon which he refused the husband's application.

On the face of it it seems anomalous that a woman who has obtained an order for maintenance as a wife, such maintenance to be provided by her husband, when she has put an end to the relation of husband and wife may still say that the order for the maintenance of the wife by the husband subsists. It is not because it seems anomalous that that may not be the result of the statutory provision, and neither is it conclusive to show that it is contrary to common sense.

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Dealing with the second position first, the state of the matter is this. Here was a husband who deserted his wife, and who, while matters were in that state, was ordered by a magistrate to make a contribution to the maintenance of his wife and children. After some time had elapsed the woman who had been so ill-used took proceedings for divorce, and obtained a decree of dissolution of the marriage on the ground of her husband's adultery and bigamy, but she still remained the mother and the custodian of the children. The magistrate had given her the custody of the children, and this Court, under ordinary circumstances, if there had not been that order for custody, would have made such an order. So this married woman remains the custodian of the children, their natural and legal guardian, and is liable for their maintenance. There are grounds of common sense why an order which dealt with maintenance and not with the general obligations of married life should continue to subsist.

That, however, does not conclude the matter at all. It is still necessary to see what are the limits of the justice's jurisdiction. Mr. Frampton made a shrewd remark, which went to the root of his own case. He said that the decree absolute had put an end ipso facto to the magisterial order, and that the appellant had only gone to the magistrate to call his attention to the fact and to get him to make an order discharging the previous order. Well, if the previous order had ipso facto been discharged, the magistrate, of course, had no jurisdiction to do anything. If it had not been discharged, then the discharge of it depends upon s. 7 of the Act of 1895. As my brother pointed out, the appellant is put into rather a dilemma by the two arguments addressed to us: If the order is discharged ipso facto there is no jurisdiction of the magistrate to entertain this summons; if the order is not so discharged, there is a discretionary jurisdiction. This jurisdiction is statutory. Sects. 4 and 5 of the Act of 1895 describe the persons who may resort to the jurisdiction and the relief they may get. The person in s. 4 is "any married woman" under various circumstances; that is a woman who at the time of her resort to the Court of summary jurisdiction

is qualified by her condition. Then s. 5 describes what kind of order may be made; and s. 5 (*c*) provides "that the husband shall pay to the applicant personally, or for her use, to any officer of the Court," and so on, "such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable." Relevant to that is s. 5 (*b*), which provides for giving the wife the custody of the children, whom, of course, she would have to maintain. The order was made, and that gave effect to s. 5 (*b*) and s. 5 (*c*). Mr. Frampton says the description of the payee as a "wife" and the payor as a "husband" operates as a limitation of the rights of the wife and of the obligation of the husband. Mr. Barnard, on the other hand, says: No, the Act is describing persons who may claim remedies, and the words are mere words of description of persons standing in certain relationship at the time the Court of summary jurisdiction comes to deal with them, not limiting the jurisdiction to the time during which they answer to that description. Sect. 7 is, he says, the only section which limits the operation of the order when it has once been obtained. Under that section it is in the power of the Court of summary jurisdiction upon fresh evidence to alter, vary or discharge the order and to increase or diminish the amount of the weekly payment. Then there is this proviso: "If any married woman upon whose application an order shall have been made under this Act," and so on, "shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." That is the only limitation the Legislature imposed. When this Act was passed in 1895 a woman who added to desertion a grievance of her husband's adultery might proceed for a divorce. One must assume that the authors of this Act and the Legislature which enacted it were aware of that elementary fact. They took the view which this appellant took, that such an order once made and while the parties are alive is not got rid of except by an order of the Court of summary jurisdiction, and that an application must be made. On the whole, I think the appellant was right in his original

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view that he must go to a Court of summary jurisdiction to get rid of this order, although there had been a decree absolute for divorce, and it seems to me to follow from that that if there were not the statutory grounds of discharge of the husband from his obligation under the order, then before the appellant could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged. He failed to so satisfy the magistrate. I entirely agree with the reasons upon which the magistrate founded that view. The magistrate thought it was a very convenient thing that this order should subsist and that a Court, which was close at hand to the parties, should be able to give the wife assistance if she needed it, or give the husband relief if he was entitled to it.

I agree entirely with the reasoning of the learned magistrate, and I think this appeal fails.

HORRIDGE J. The question in this appeal is whether or not there is any provision in the Summary Jurisdiction (Married Women) Act, 1895, which limits the operation of orders made under s. 5 to the period of the existing marriage. I can find no such words. In s. 5 (*c*) the provision that "the husband shall pay to the applicant personally" is merely defining the husband at the time of the application. The "applicant personally," of course, is the wife, but there are no words to show that the order itself is to be limited to the period of marriage. That being so, the Court of summary jurisdiction is thrown back on s. 7, and under that it is a matter of discretion which I think in this case the learned magistrate has properly exercised, and this appeal ought to be dismissed.

Barnard. The appeal will be dismissed with costs.

THE PRESIDENT. Yes.

Solicitors for appellant: *Ward, Bowie & Co., for J. Wurzal, Leeds.*

Solicitors for respondent: *Collyer-Bristow & Co., for A. E. Masser, Leeds.*

J. R. B.

ADMIRALTY.

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Nov. 3, 4, 5, 12.

THE MOLIÈRE.

Shipping—Collision—Damages—Action in rem—Compensation to Dependants under foreign Statute—Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 5—Surveyor's Fees—Surveyor engaged and paid by Underwriters.

The Maritime Conventions Act, by s. 5 of which proceedings in respect of loss of life or personal injuries can be brought in rem or in personam in any Court possessing Admiralty jurisdiction, has not altered the law that claims in respect of loss of life, which give no right of action for damages but merely a right to compensation under a statute, are not within the Admiralty rules or jurisdiction. Such claims, therefore, cannot be included as an item of damage in an action in rem by a shipowner for damages against the owners of another wrongdoing vessel.

A shipowner is not prevented from recovering surveyor's fees (so far as they do not relate to mere surveillance for underwriters) as one of the items of a claim for damages in a collision action, by reason of the fact that, although superintending the collision repairs for the shipowner, the surveyor was engaged and paid by the underwriters.

MOTION in objection to the report of the registrar. The plaintiffs (respondents) were the owners of the Swedish steamship *Adolf*; the defendants (appellants) were the owners of the British steamship *Molière*.

On March 17, 1920, a collision took place between the two vessels in the Bristol Channel, and ultimately by a decision of the Court of Appeal both vessels were held equally to blame. The cross-claims were brought to a reference before the registrar and merchants to assess the damages and the registrar reported upon them. The owners of the *Molière* objected (inter alia) to two items allowed in the claim of the *Adolf*—namely, a sum of 500*l.* allowed in respect of survey fees, and 165*l.* 18*s.* 7*d.*, compensation paid to the relatives of a seaman on the *Adolf*, who was drowned in the collision.

Lewis Noad for the owners of the *Molière*. The registrar was wrong in allowing anything against the owners of the *Molière* in respect of the fees paid to the surveyor superintending the repairs to the *Adolf*. The surveyor was appointed and paid by the Swedish underwriters to protect their own interests, and, the owners of the *Adolf* not being liable for his

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fees, cannot recover any proportion of them from the owners of the *Molière*.

The registrar was also wrong in allowing the sum paid to the dependants of the deceased seaman on the *Adolf*. The payment was made under a Swedish statute similar to the Workmen's Compensation Act—a statute which makes provision for compensation quite apart from any question of negligence. Before the Maritime Conventions Act, 1911, such a claim clearly could not have been included as an item of damage in a shipowner's action in rem against the owners of a wrongdoing vessel: *The Circe*. (1) That Act has not altered the law in this respect; none of its sections have any reference to compensation, they all relate to damages, and, in dealing with loss of life or personal injury, to damages recoverable from the owners of a wrongdoing vessel or vessels other than that of the carrying vessel. It could not have been the intention of the Legislature to include claims for compensation as well as claims for damages, for they have not used the appropriate language, and the draftsman must be assumed to have had knowledge of the effect of the decision in *The Circe*. (1) *The Annie* (2) was a case under the Workmen's Compensation Act, 1906, s. 7 of which extends the provisions of the Act to seamen and provides for compensation to dependants; the decision has no application to a claim for contribution in a "both to blame" case: see *Cory & Son* v. *France, Fenwick & Co.* (3)

[*The Rigel* (4) and *The General Havelock* (5) were also referred to.]

I. H. Stranger for the owners of the *Adolf*. As regards the surveyor's fees it is immaterial that the underwriters appointed and paid him. It cannot be contended that the services of a surveyor were unnecessary, he superintended the work for the owners, and a reasonable sum for his fees in respect of those services—the claim has not been allowed in full—is recoverable as an item of the collision damages.

(1) [1906] P. 1.
(2) [1909] P. 176.
(3) [1911] 1 K. B. 114.
(4) [1912] P. 99.
(5) [1906] P. 3n.

The registrar was also right in allowing the sum paid to the dependants of the deceased seaman. The compensation had to be paid; there was no answer to the claim under the Swedish statute any more than there would have been under the Workmen's Compensation Act in the case of a British ship under similar circumstances. In the absence of evidence to the contrary the presumption is that the Swedish law is the same as the British law. At the time of the decision in *The Circe* (1) compensation to dependants in respect of loss of life was not so universal as it is now, when most countries have passed statutes similar in their effect to the Workmen's Compensation Act. Since that Act and the Maritime Conventions Act the decision in *The Circe* (1) is no longer good law. The amount paid to dependants as a consequence of the collision is as much an item of damage as the amount of the injury to the ship—both are sums which the plaintiffs have lost, and are damages within the meaning of the Maritime Conventions Act.

[*The Cedric* (2) was referred to.]

Noad replied.

Cur. adv. vult.

Nov. 12. ROCHE J. read the following judgment: In an action of damage arising out of a collision which occurred in the month of March, 1920, between the Swedish steamship *Adolf* and the British steamship *Molière*, both vessels were held equally in fault. Claims were brought to a reference by the owners of these vessels, and the registrar assisted by merchants, reported on these claims.

The owners of the *Molière* objected to the allowance of two items in the report upon the claim of the owners of the *Adolf*, and further objected, in respect of their own claim, that the report allowed too little in respect of demurrage or loss of time. (3) The first objection arose in respect of item 99 of the claim of the *Adolf*, being survey fees, 695*l.* 10*s.* was claimed

(1) [1906] P. 1.
(2) [1920] P. 193.
(3) NOTE.—The objection in respect of demurrage raised no question material to this report, and the judgment on this point is omitted.

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and 500*l.* was allowed. The objection is to the allowance of any part of that sum. The matter is thus dealt with by the registrar in his reasons : " Objection was taken to the charges of the only surveyor who was employed, and it was contended that the surveyor, having been paid by the underwriters, the owners of the *Adolf* could not recover this amount. There is evidence, however, that the surveyor was also instructed by the master, and further no other surveyor having been employed, the work in question must be regarded as work and labour, for the costs of which the defendants are liable, since the services of a surveyor were indispensable. Therefore 500*l.* of this item has been allowed." The finding that the surveyor was requested to act or employed on behalf of the owners is supported by the evidence, and the real ground of objection put forward was that the underwriters, and not the owners, had paid the surveyor's fees. It was not and could not be disputed that in respect of heavy repairs done to a Swedish vessel in England, costing some 11,000*l.*, the services of a surveyor were necessary, and it was not contended that the amount allowed was excessive. The report and reasons of the registrar are, in my opinion, clearly correct. The measure of damage recoverable in respect of a ship is the amount of damage done, whether repairs are executed or not. But where repairs are done the cost is the usual and convenient standard whereby to measure the damage. The expenses of survey and superintendence are, in most cases—of which the present is one—a necessary part of the cost of repairs, and are properly and generally allowed. It was stated by counsel that the practice in the registry still accords with the practice that I personally recollect, and that two sets of surveyors, one for owners, and one for underwriters, are not allowed. That practice is correct in my view, inasmuch as the necessity for two sets of surveyors arises not out of the necessities of the collision damage, but out of the infirmities of human nature. This practice may have misled the objectors in the present case. But here the surveyor was employed, not in watching the owners' operations, but in surveying and superintending the owners' work, and it is in my view nothing in point that he

happened to be generally employed by the underwriters, or that the underwriters paid his account. It is to be observed that the account is not allowed in full, and it is to be assumed—and, indeed, the registrar's reasons imply—that any part of the surveyor's work which was mere surveillance for underwriters has not been allowed. What has been allowed is payment for his services which were rendered to the owners, and were indispensable to repair. As to the fact that the underwriters have paid the account, such a state of circumstances must exist in respect of a very large number, probably the majority, of the repair accounts which are brought into the registry, and the doctrine of subrogation exists because of this fact, and for the very purpose of dealing with this and similar situations. I therefore decide against this objection.

I now pass to the second matter of objection : the allowance of item 101 " compensation paid to the relatives of William Samuelsson who was drowned in the collision—165*l.* 18*s.* 7*d.*" The registrar deals with the matter in his reasons as follows : " The only other item which requires to be referred to is item 101, which was in respect of compensation paid for a life claim. This claim was objected to by the defendants. I am of opinion that it should be allowed. The collision appears to have been the cause of the death of the sailor in question and the claim is one which is covered by the Maritime Conventions Act, 1911, and there are no judicial decisions to the contrary."

The point is one of considerable difficulty, but having heard full arguments, and having taken time to consider my judgment, I have arrived at the conclusion that the law remains as it was before the Maritime Conventions Act, 1911, and that the decision of the learned registrar on this point cannot be supported. Before the passing of the Maritime Conventions Act the position as to claims for loss of life or personal injury in relation to Courts with Admiralty jurisdiction was as follows : where such claims had to be enforced by action they were not within the jurisdiction of the Court of Admiralty as such, accordingly an action in rem will not lie to enforce them, and the Admiralty rules as to division of loss had no

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application in respect of them. See *The Vera Cruz* (*No.* 2) (1); *The Bernina.* (2) An action in personam could of course be brought in the Admiralty Division to enforce such claims, subject to the same rules of law as would apply to them in a Court of common law. Where such claims gave no right of action, but a right to compensation subsisted or arose under some statute, British or foreign, it could not be contended that it was within the jurisdiction of the Court of Admiralty to award compensation to a claimant. But in the year 1905 an attempt was made in proceedings in rem to include a moiety of the compensation paid to a seaman under a foreign statute in the shipowners' claim for damages against the owners of another vessel held to be partly to blame in proceedings in rem: see *The Circe.* (3) Sir Gorell Barnes (President) decided that the claim was not one within the Admiralty rules or jurisdiction. The learned President also stated that such a claim for compensation was not recognized by the law of England. At the date of his decision (1905) British seamen were not covered by any Workmen's Compensation Act. Their inclusion was brought about by the Act of 1906 (6 Edw. 7, c. 58). Thereafter shipowners who paid compensation under that Act successfully enforced the right of indemnity conferred by s. 6, sub-s. 2, of the Act itself in the Admiralty Division: see *The Annie.* (4) But such enforcement was achieved by an action in personam, and it clearly follows from the decision of the Court of Appeal in *Cory & Son* v. *France, Fenwick & Co.* (5), that the Admiralty rules as to division of loss were inapplicable to such an action. It was there held that contributory negligence was an answer to a plaintiffs' claim for indemnity.

It remains to consider what, if any, change has resulted from the passing of the Maritime Conventions Act. The sections having a bearing on this matter are ss. 1, 2, 3 and 5. Their effect may be, I think, sufficiently summarized as follows: s. 1 alters the Admiralty rule as to division of loss by

(1) (1884) 9 P. D. 96.
(2) (1888) 13 App. Cas. 1.
(3) [1906] P. 1.
(4) [1909] P. 176.
(5) [1911] 1 K. B. 114.

substituting for equality of division a division into proportions based on degree of fault, but preserves the earlier limitation of the rule itself to cases of damage to ship, cargo, freight and property on board. Sect. 5 confers on Courts with Admiralty jurisdiction, jurisdiction in rem or in personam in respect of damages for loss of life and personal injury. Sect. 2 provides that where two vessels are to blame, and loss of life and personal injury claims arise, liability shall be joint or several. It follows that the plaintiff in an action to recover damages for these matters is not subject to any rule as to division of loss. Sect. 3 provides for contribution as between owners where more than one vessel is to blame and one owner has paid more than his due proportion (estimated in accordance with s. 1) of damages recovered in respect of matters dealt with under ss. 5 and 3—i.e., in respect of claims for loss of life or personal injuries. It is to be observed that ss. 2, 3 and 5 of the Act are concerned with damages and with actions therefor. No mention is made of compensation or of claims for compensation arising independently of fault in a shipowner, and no right of contribution or indemnity is conferred in respect of payments made by way of compensation. On any other view the silence of the contribution section (s. 3) with regard to the case of an owner who may have to pay compensation, though his vessel is not in fault at all, would be quite inexplicable. The Maritime Conventions Act, therefore, in my opinion, leaves the matter where it was before, and does not cover, or support, the claim now under consideration. It was suggested during the argument that since the date of the decision in *The Circe* (1), circumstances had changed, and that by the laws of England and foreign countries alike compensation to seamen for accident and loss of life was so generally payable, independently of any considerations of fault in the owner, that it had become a head of damage so natural and probable as to be recoverable in an action, such as the present action. Apart altogether from any difficulties as to jurisdiction in Admiralty in rem or as to division of loss, I am of opinion that this contention is not open. The matter

(1) [1906] P. 1.

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is concluded in all the Courts of this country by a line of decisions from *Baker* v. *Bolton* (1) to *The Amerika*. (2) The principle that (apart of course from some statute) the death of a human being per se is not actionable, and cannot found a claim for damage, was laid down by Lord Ellenborough in the case first mentioned, and was held by the House of Lords in the case last mentioned to have become established as part of the common law and to be incapable of disturbance save by legislation.

For these reasons I allow the second objection to the report of the registrar, and disallow this item of the *Adolf's* claim.

Solicitors for the plaintiffs (respondents): *Stokes & Stokes, for Bramwell, Clayton & Clayton, Newcastle-on-Tyne.*

Solicitors for the defendants (appellants): *Godfrey Warr & Co., for Cameron, MacIver & Davie, Liverpool.*

E. C. M. T.

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Dec. 2.

DIVORCE.

PARTINGTON *v.* PARTINGTON AND ATKINSON.

Divorce—Practice—Evidence—Decree in previous Suit in which Petitioner (Husband) was Co-respondent—Estoppel.

The fact that a husband who petitions for a divorce against his wife was co-respondent in a previous suit, not between the same parties, in which a decree for divorce had been granted, containing a statement that he has been guilty of adultery, does not create an estoppel. The production of the decree in such a case is evidence that the husband has committed adultery, but does not preclude his denying the fact. A decree nisi may be made in his favour if he denies the adultery. But in that case the facts may be laid before the King's Proctor in order that, if he sees fit, the evidence in the former action may be brought before the Court.

THIS was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent.

The parties were married in 1906, and there were two children of the marriage, born in 1907 and 1912 respectively.

(1) (1808) 1 Camp. 493. (2) [1914] P. 167; [1917] A. C. 38.

The husband filed this petition in February, 1924, in which he alleged that his wife and the co-respondent had committed various acts of adultery from the month of March, 1920, to November, 1920, and had lived and cohabited together at three different places for practically continuous periods from the beginning of June, 1921, to the end of December, 1923.

The respondent put in no answer.

The co-respondent put in an answer alleging that the petitioner had in November and December, 1920, and January and February, 1921, committed certain acts of adultery with a Mrs. Fairhurst, which were the occasion of a petition brought by her husband for a divorce, in which, though the petitioner denied the adultery, the jury had found that it had taken place and Horridge J. granted a decree nisi with costs. The decree recited in terms that the present petitioner had been guilty of adultery with the respondent in that action, and assessed the damages against the present petitioner at 200*l.* The decree nisi had since been made absolute. The co-respondent also accused the petitioner in this action of adultery with another woman, who intervened in this action and denied it.

The petitioner by his reply denied the adultery alleged against him in the former action as well as the new adultery alleged in this action.

Bayford K.C. and *Noel Middleton* for the petitioner. The petitioner was found guilty of adultery in a previous case between other parties, in which he was co-respondent. He denied, and he still denies the adultery. We submit that the decree in that case is not an estoppel against the husband, though it may be evidence against him.

The authorities appear to be somewhat conflicting.

In *Conradi* v. *Conradi* (1) Lord Penzance admitted a former decree as evidence against the petitioner, but under special circumstances granted the divorce in exercise of his discretion.

In *Ruck* v. *Ruck* (2) Gorell Barnes J. on similar facts held that the decree in the former action was not conclusive against

(1) (1868) L. R. 1 P. & M. 514. (2) [1896] P. 152.

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the husband. But there the decree found that the respondent had committed adultery with him, but did not in terms state that he had committed adultery with her.

In *Crawshay-Williams* v. *Crawshay-Williams* (1) Evans P., and in *Eskell* v. *Eskell* (2) Lord Coleridge J., held that the production of the decree in a suit in which the husband was co-respondent was sufficient proof of his adultery when his identity was proved or admitted.

Elkin for the co-respondent. I do not propose to call the co-respondent or offer any evidence in support of his answer. I submit that the finding and the decree in the former trial are matters of record and the husband is bound by them and cannot have his decree in this action.

HORRIDGE J. said that before deciding the point, which affected the practice of the Court, he should like a word with the President.

HORRIDGE J. [after having a conversation with the President :] The question which has been raised in this case is whether or not a decree in a former suit in which the present petitioner was cited as co-respondent, and in which suit by, and on the face of, the decree he is found guilty of adultery, is conclusive in the present suit which he is bringing for dissolution of marriage with his wife ; conclusive in the sense that it compels me to find in these proceedings that he has in fact been guilty of adultery.

The first of the authorities which have been cited to me is *Conradi* v. *Conradi*. (3) In that case a husband had brought a suit for dissolution against his wife, and joined the co-respondent. He was found in that suit guilty himself of adultery. He subsequently brought another suit against his wife with another co-respondent, and in that suit the decree in the first suit finding him guilty of adultery was held by the Judge Ordinary to be conclusive in the second suit ; but there both suits were between the same parties with reference to the same marriage, although there were

(1) The Times Newspaper, Jan. 15, 1915.

(2) (1919) 88 L. J. (P.) 128.

(3) L. R. 1 P. & M. 514.

different co-respondents. The learned Judge Ordinary says this (1): "for by whomsoever the petitioner's adultery was alleged in the former suit, that adultery was declared and adjudged to have been proved in a decree pronounced between the very parties who (so far as the question of divorce is concerned) are the sole parties to this suit." Therefore it was a decree inter partes, between the same parties.

The next case is *Ruck* v. *Ruck*. (2) That suit was before the late Gorell Barnes J. in which a wife claimed a divorce. There it was desired to put in a decree in a previous suit in which the husband was the co-respondent with whom the respondent in that case had been found guilty of adultery. Gorell Barnes J. pointed out that there was no finding on the face of the decree of adultery of the co-respondent, but only of the respondent, and held that evidence must be given of the adultery of the co-respondent. He did not say what would have been his view if the decree had had, as in this case, upon the face of it the finding of adultery between the then respondent in the earlier suit and the co-respondent in that suit.

There appear to be two other cases. The one before Sir Samuel Evans was *Crawshay-Williams* v. *Crawshay-Williams*. (3) There, where there was no denial of the adultery and no evidence given in denial of it, the learned President acted upon the decree as being evidence. The same observation applies to *Eskell* v. *Eskell*. (4) I read those two cases merely to mean that the decree in the former suit, as a decree made in the presence of the co-respondent in that suit, is evidence against him in subsequent proceedings, but they do not seem to me to go the necessary length of saying that it is conclusive between the parties.

I think in this case the man is entitled to deny his adultery if he wishes to do so, although it has been found against him in a previous suit, and as it may be that in this case it is not in the interests of anybody to put before me the evidence

(1) L. R. 1 P. & M. 521.
(2) [1896] P. 152.
(3) The Times Newspaper, Jan. 15, 1915.
(4) 88 L. J. (P.) 128.

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Horridge J.

on which he was convicted on the last occasion, it is my duty to see that the King's Proctor is communicated with, and, if he sees fit, that that evidence is put before the Court in the form of other witnesses.

The petitioner's evidence was then called. His witnesses were not cross-examined and no evidence was given against the intervener.

HORRIDGE J. granted a decree nisi with costs against the co-respondent, to include all the costs of the intervener, but directed the case to be laid before the King's Proctor.

Solicitors for petitioner and intervener : *Gibson & Weldon, for Pickup & Kay, Blackpool.*

Solicitors for co-respondent : *A. De Frece & Co., for Quilliam & Son, Liverpool.*

J. R. B.

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PROBATE.

In re GRIFFIN.

GRIFFIN *v.* ACKROYD.

Probate—Practice—Administrator pendente lite—Appointment of Party to Action.

There is no absolute rule that a party to an action propounding a will cannot be appointed administrator pendente lite without the consent of all parties. The Court will make such an appointment when circumstances make it clearly desirable.

WILLIAM CHILTON GRIFFIN, the testator in this action, died on August 3, 1924, having made a will, dated August 28, 1922, by which he made his wife residuary legatee. In May, 1923, he became incapable of managing his affairs, and by an order in Lunacy his wife was appointed receiver of his estate with power to carry on his business of a timber merchant. She had successfully carried on the business during his life. This action was brought by his widow for probate of the will

of August 28, 1922, and she now moved for the appointment of herself as administratrix pendente lite, with power to carry on the business. The testator's daughter, who was the only defendant and propounded an earlier will, refused to consent to the appointment.

H. Durley Grazebrook for the plaintiff.

Clifford Mortimer for the defendant. The rule of the Court is absolute that a party to the action will not be appointed administrator pendente lite unless all the other parties consent: Tristram and Coote's Probate Practice, 15th ed., 1915, p. 335; *De Chatelain* v. *Pontigny*. (1)

Grazebrook in reply. The text-books have stated that rule much too widely. It may have been an absolute rule at one time, but of late years the Court has not refused to appoint a party where, as in this case, it is obviously desirable.

HORRIDGE J. I am not satisfied that there is any absolute rule against appointing a party. The order must be made as prayed; costs to be costs in the action.

Solicitor for plaintiff: *Leonard Hubbard.*

Solicitors for defendant: *Metcalfe, Sharpe & King.*

(1) (1858) 1 Sw. & Tr. 34.

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[IN THE COURT OF APPEAL.]

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Shipping—Collision—Damage—Consequential Damage—Novus actus interveniens—Onus of Proof.

In an action of damage by collision the onus of proving that damage directly flows from the defendant's negligence causing the collision is on the plaintiff; and the dicta of Dr. Lushington in *The Mellona* (1847) 3 W. Rob. 7, 13; *The Pensher* (1857) Swa. 211, and similar cases, to the effect that where damage follows a collision the presumption is that the damage is the result of the collision, unless the defendant proves the contrary, must not be taken as laying down a principle, but as having reference only to the particular circumstances of those cases, where the damage (stranding) so obviously followed on the collision that it prima facie was to be regarded as a consequence of the negligence causing the collision.

Decision of Duke P. reversed.

Appeal from a decision of Sir Henry Duke P. in an action of damage by collision.

The appellants (defendants) were the owners of the steamship *Paludina*; the respondents (plaintiffs) were the owners of the steamship *Singleton Abbey*.

On November 22, 1922, both vessels with several others were lying moored at the Fish Market Quay in the Grand Harbour at Valetta, Malta. The wind was blowing strongly from the E.N.E. and there was a good deal of rise and fall in the sea. About 8 a.m. the *Paludina's* starboard bow came in contact with the *Singleton Abbey's* port bow, doing slight damage (collision No. 1). About 11.30 the *Paludina* fell down upon the *Singleton Abbey* and broke her away from her moorings (collision No. 2). The *Singleton Abbey* thereupon fell down upon another vessel, the *Sara*, which was to leeward, and broke away the *Sara* from her moorings (collision No. 3). About twenty minutes later, the *Sara*, in the course of manœuvring, got under the counter of the *Singleton Abbey*, whose propeller was revolving, and received such injuries that she sank (collision No. 4). The damage and loss due to the sinking of the *Sara* were not in question, that issue having been fought in the Court at Malta, which

found neither vessel to blame; but by the collision which sank the *Sara* the propeller of the *Singleton Abbey* was seriously damaged, all four blades being broken, and in respect of that injury as well as in respect of the damage done in collisions 1, 2 and 3, the owners of the *Singleton Abbey* claimed damages from the owners of the *Paludina*.

The learned President having found the *Paludina* to blame in respect of collisions 1, 2 and 3 continued as follows:—

"As to collision No. 4—the second collision with the *Sara*—I have felt some difficulty, considering it as a legal problem. The master of the *Singleton Abbey* gave evidence with entire frankness on the subject. He described how, using his best judgment and in exceedingly difficult circumstances, with the risk of going ashore to leeward from one cause, or of coming into collision with the *Sara* from another cause, he used his engines until the second officer, who was keeping observation aft, gave him word to discontinue their use. He said quite frankly that a few seconds would have avoided it. He said also that the *Sara* did not appear to him to have steam, or to be using her steam, and that a quarter of an hour or twenty minutes elapsed from the time he was clear of the *Sara* to the time when this second collision occurred. I have not had any evidence from the *Sara*, and I have to consider whether the machinery of mischief having been set in motion by the defaults, as I consider, of the defendants, they free themselves from liability for this collision by showing that there was an intervening negligence on the part of the *Sara*, or of the *Singleton Abbey*, or of both of them. That is a mixed problem of fact and law. If the evidence shows that it was the negligence of the *Sara* which produced this collision, then obviously the owners of the *Paludina* ought not to be visited with the costs of repairing the damage to the propeller of the *Singleton Abbey*. I have consulted the Elder Brethren about that matter, and they tell me that in the state of things which I have described they cannot say that the *Sara* was to blame for this collision —that they cannot tell me why it probably was that the

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Sara was not able to avoid the propeller blades of the *Singleton Abbey*.

"I have come to the conclusion that the defendants have not established that collision No. 4 was due to the negligence of those in charge of the *Sara*. The *Sara* was put in a position of peril and difficulty, and those on board of her were exerting themselves to release their ship from that position. They failed, and the ship was sunk; but the facts as they stand, upon the advice I have had, do not satisfy me that that was the fault of those on board of the *Sara*, or that it was due to any negligence of theirs. As to the master of the *Singleton Abbey*, I came to the conclusion, on the advice of the Elder Brethren, that he did his best under circumstances of great difficulty, and that his action in using his engines as he did was action which he might properly take under the circumstances—action which involved peril, but taken for the purpose of saving his ship from a greater peril."

His Lordship accordingly held the defendants liable also for the propeller damage to the *Singleton Abbey*. In respect of this part of the judgment the defendants appealed, on the ground that the President was wrong in pronouncing the *Paludina* to blame for collision No. 4; that it was not for the defendants to show that there was an intervening act of negligence which broke the chain of causation, but for the plaintiffs to establish that the damage of which they complained directly flowed from the defendants' negligence; and that in fact there were intervening acts of negligence on the part of the *Singleton Abbey* in not stopping her propeller in due time, and on the part of the *Sara* in not keeping clear of the *Singleton Abbey*.

Butler Aspinall K.C., *Stephens K.C.* and *Langton* for the appellants.

C. R. Dunlop K.C. and *Lewis Noad* for the respondents.

The arguments sufficiently appear from the judgments.

In addition to the cases there cited *The Linda* (1) and *The George and Richard* (2) were referred to.]

(1) (1857) Swa. 306.

(2) (1871) L. R. 3 A. & E. 466.

BANKES L.J. This appeal has reference only to what has been referred to as the last collision of several which occurred on the day in question, the collision between the *Sara* and the *Singleton Abbey*. That collision was the result of something which happened a considerable time before, and it is necessary to refer to those circumstances in order to lead up to the point which this Court has to decide. [His Lordship stated the facts set out above and continued as follows :] The question we have to decide is whether the learned President was justified in coming to the conclusion, after taking the advice of his assessors, that the damage, which is the subject of this appeal, was directly caused by the original negligence of the *Paludina*.

Something has been said to us about the burden of proof. I entirely adopt what Hill J. said in *The Waalstroom* (1), to which I will refer in a moment. It seems to me that the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. In some cases a considerable interval may elapse between the time when the negligence is said to have occurred and the time when the damage is said to have resulted. In those cases I think the onus lies upon the plaintiff to show that the chain of causation connecting the damage with the negligence is complete. He may give evidence which, if not challenged and in reference to which no suggestion is made that it is not complete, will discharge the burden, or which is such that in the absence of any such challenge there is only one inference which could be drawn. I think it is in reference to cases of that class that the authorities to which we were referred by Mr. Dunlop apply, and I think that the dicta of the learned judges, which he cited, have reference to the particular facts which were given in evidence before them. I do not think that they can be treated as in any sense rules of law varying the general rule that in cases of this kind it lies upon the plaintiff to establish his case. I will read what Hill J. said, because I think it accurately puts in a very few words what the law

(1) (1923) 17 Ll. L. Rep. 53.

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is in reference to this particular point. He says: "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs: but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is prima facie a consequence of the collision. But here, where there are a great many other facts to decide as to the subsequent disaster, beside the fact of the collision, in my view, the plaintiffs have a burden which, however it shifts from time to time, remains upon them; and they have not discharged that burden."

Here the case for the plaintiffs is that the chain of causation is quite complete; the *Singleton Abbey* and the *Sara* were both broken adrift by the negligence of those in charge of the *Paludina*; there is no novus actus interveniens; and therefore the view taken by the President was right. The argument for the defendants is that upon the plaintiffs' own evidence there are two links missing. First, it is said that although the *Sara* was broken adrift by the negligence of the *Paludina*, she was still a free agent; that the inference to be drawn from the evidence was that her steam was up, and that she could have gone to any part of the harbour she liked and have been quite safe and out of the way of the *Singleton Abbey*; and that it could not be said, therefore, that the chain of causation was complete when it was found that the *Sara* had this opportunity of which, through a want of proper skill and seamanship, she did not avail herself. Secondly, it is said that another link in the chain is missing owing to the action of the master of the *Singleton Abbey*. He had steam up, he saw, and had an opportunity for twenty minutes of realizing, the position in which the *Sara* was. He realized that the *Sara* was coming down upon him, and he was told by the second officer that the engines ought to be stopped. I will read his own words. He was very frank about it. In re-examination he was asked: "The suggestion

is made that you ought to have stopped your engines, or rung them to stop before you did, so as to avoid hitting the *Sara* with your propeller—what do you say with regard to that? (A.) Well, I had to keep my engines going as long as I could, because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little bit too late." The defendants say that upon that there is a clear break in this chain. They contend that the damage complained of was not the result of the original negligence of the *Paludina*, but was due to the fault of the plaintiffs' own master. The plaintiffs' reply is that it ought not to be attributed to him as a fault; he was in a position of danger, a position in which the defendants had placed him; and that under those circumstances the chain is complete.

Both these points on which it is said that the chain is not complete are largely matters of seamanship—what was the right and proper thing to do under the particular circumstances—and we naturally take the advice of our assessors. I have asked them whether, assuming that the *Sara* had steam up—I assume that for the purposes of the question—were those in charge of the *Sara* guilty of a want of reasonable care and good seamanship in not keeping the *Sara* clear of the *Singleton Abbey*? They give a reasoned answer, the result of which is that they say No. On that point therefore it is immaterial whether the issue is upon the plaintiffs or the defendants, the suggested break in the chain does not exist. The second question was: Under the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? Their answer is, Yes. After having heard the arguments of Mr. Dunlop and Mr. Noad upon the point, so far as I am able to give an opinion, I entirely concur.

In those circumstances it seems to me that it is unnecessary

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to look very closely at the question of onus of proof, because even assuming it was on the defendants to prove a break in the chain of causation, they have proved it. In these circumstances the decision of the learned President must be reversed on this point, and the appeal will be allowed with costs.

SCRUTTON L.J. I do not dissent from the conclusion at which my brothers have arrived, but I think it fair to say that I have felt considerable doubt during the course of the argument, and I do not regard this as at all an easy case.

A number of ships were lying moored along a quay in Valetta Harbour with the wind blowing rather strongly into the harbour and with a considerable send of the sea. In these circumstances the *Paludina* broke loose, and, as is inevitable when a number of ships are moored in a row, she broke loose other vessels. No question comes before us in this appeal as regards her liability for breaking loose the *Singleton Abbey*. She knocked the *Singleton Abbey* into the *Sara* and the *Sara* broke adrift. There is no question here as to the liability of the *Paludina* for anything that happened in what I may call the first collision between the *Singleton Abbey* and the *Sara*. The *Paludina* went on and ran into some other ship, and ultimately collided with some moorings further up the harbour and fetched up. The *Singleton Abbey* and the *Sara* got away from the track of the *Paludina*, and after some twenty minutes they came into collision with each other and the *Sara* was sunk. When the case came before the Admiralty Court the plaintiffs' pleaded case was that the *Paludina* fell bodily against the port side of the *Singleton Abbey*, causing her to collide with the *Sara*, whereby the *Sara* was sunk. The defendants replied that it was not through any negligence of theirs that the *Sara* was sunk. It turns out not to be the fact, however, that the *Sara* sank owing to the original collision. What the exact facts are as to the subsequent collision is not very clear. Our assessors advise us that they doubt whether the *Sara* and the *Singleton Abbey* ever got really clear of each other; they think that they were always quite close to each other. Some twenty minutes

afterwards, owing to something that was done, probably—this is my own view and not the opinion of the assessors—owing to the *Sara* hauling on her anchor and nearly getting it up in an attempt to get away, the *Sara* began drifting astern and struck the bow of the *Singleton Abbey*, drifted down along her side and got under the counter where the propeller of the *Singleton Abbey* was revolving. The *Singleton Abbey* was using her propeller to keep herself head to wind and to prevent herself from drifting further. Her second officer was aft in accordance with the usual practice of vessels in port, in order to give warning to the bridge when the use of the propeller might be dangerous. Apparently the second officer did warn the bridge that there was going to be danger if the propeller was working while the *Sara* was drifting aft, and the master acted on that warning by stopping the engines. But either the warning was given too late or the master did not act upon it in time, with the result that when the *Sara* got under the counter the propeller was still revolving; it struck the *Sara*, broke four blades, and sank the *Sara*.

The question between the *Sara* and the *Singleton Abbey* fortunately is not before us; that has been fought out in the Court of Malta, which has found neither party to blame. As between the *Sara* and the *Singleton Abbey*, therefore, the damage to the *Sara* is not before this Court; what is before us is the attempt of the *Singleton Abbey* to recover from the *Paludina* the damage done by the *Sara* to the propeller of the *Singleton Abbey*. It is said that there is a rule of the Admiralty Court, supported by several decisions of Dr. Lushington, that the presumption is that damage following a collision is the result of the collision unless the defendant proves the contrary. All the cases, so far as I have looked at them, in which that doctrine is supposed to be laid down, are cases where the damage happens to the ship primarily affected by the collision, and there is no suggestion of the action of third parties. A collision occurs between ships A. and B., and shortly after the collision B. goes ashore; that is the ordinary type, and Dr. Lushington has said that in a case like that one does not begin to inquire elaborately

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why the ship went ashore; it is to be assumed, until the defendant has shown the contrary, that she went ashore because of the collision which happened to her just before. That is quite a different class of case from the present. Here, the *Singleton Abbey's* case is that the *Paludina* came into collision with her and that in consequence she suffered damage from a third ship. It is not even the case which frequently happens of ship A. running into ship B. and knocking her into C. No one suggests that with any degree of directness the *Paludina* knocked the *Sara* into the *Singleton Abbey* or the *Singleton Abbey* into the *Sara*. She broke them both adrift, and nearly half an hour afterwards they came into collision. It appears to me that whatever may be the case in the simple class of case of which Dr. Lushington was speaking, in the circumstances which I have suggested the plaintiff must prove his case if he alleges that a subsequent collision with a third ship, in respect of which he claims damages, is a consequence of the original collision with the defendant's ship.

There have been a number of decisions dealing with the question as to how far the intervention of a third person prevents damage being the result of the action of the defendant. Lord Sumner classified several of them in his judgment in *Weld-Blundell* v. *Stephens* (1): "Between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways"—and then he deals with some of the classes of case in which the action of third parties has or has not caused the damage to be too remote. One class of case he mentions is where a person is in a state of excusable alarm owing to the wrongful act of the defendant. He cites two cases. One is the well-known case of *Scott* v. *Shepherd* (2), where a squib was thrown in a crowded market place by A. on to B.'s stall. B. threw it away on to C.'s stall, and C. threw it away, and it exploded in D.'s eyes. D. claimed damages from the original thrower of the squib, and it was held that the intervention of B. and C. did not prevent D. from recovering

(1) [1920] A. C. 956, 984. (2) (1773) 3 Wils. 403; 2 W. Bl. 892.

from A. because the intermediate persons were in a state of excusable alarm produced by the act of A. The other case, *Jones* v. *Boyce* (1), was where a stage coach proprietor took passengers on a coach; the reins were defective and broke, and the horses went off at a gallop, and as the coach began to sway from side to side a frightened passenger on the top jumped off and broke his leg. The coach, however, went on and did not overturn. Here also it was held that the intervening act of jumping off did not prevent the passenger from recovering, as he was in a state of excusable alarm owing to the wrongful act of the defendant.

The doubt I feel in this case—and I am not sure about it now—is whether, under these circumstances, where a ship by a wrongful act has put several other ships in an awkward position—there was a strong send of the sea, a high wind, not very good holding ground, and all the ships were ranging about among each other—it can be said that the fact that one of them takes a wrong step necessarily breaks the chain of causation. But, after consideration, I do not feel able to differ from the advice which has been given us by the assessors and from the view at which my brothers have arrived. There was a considerable interval between the act of the master in not stopping his engines and the time when his ship was first set adrift by the *Paludina*. In these circumstances I do not feel able to dissent from the view that there is a sufficiently independent act on the part of the *Singleton Abbey*, which prevents the damage caused by the *Sara* being the direct consequence of the original wrongdoing of the *Paludina*. It appears to me therefore that the decision of the President on this point should be reversed.

ATKIN L.J. I agree. I am certainly not prepared to uphold the suggestion that there is a presumption of law that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision unless the defendant proves the contrary. That seems to me to be an impossible suggestion. Though the contention has been put

(1) (1816) 1 Stark. 493.

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as high as that in the arguments in this case based upon certain propositions of Dr. Lushington—if, indeed, he did lay down such a principle—I venture to say that at the present day it is wrong. In my opinion it is impossible that there can be any presumption of law; there might be in some cases a presumption of fact, though I do not think that is true. The onus must always be upon the plaintiff who claims damages to prove that the damage was caused by the negligence of the defendant, and caused in the sense that now governs these cases as laid down by the Court of Appeal—i.e., was in fact the direct result of the negligence. That is the point the plaintiff always has to prove. Of course it may often happen that in cases of collision at sea the damage that follows is of such a kind, and follows so immediately, that unless it is proved there is some other cause it is to be assumed that the damage was directly caused by the negligence. That is the case that was suggested of an immediate stranding, of which there are several reported decisions. In *The Pensher* (1), heard before Dr. Lushington, a sailing ship was in collision and drifted on to a lee shore with a precarious anchorage. She anchored for a time, and it was suggested that if there had been a longer scope of chain she would not have gone ashore. It was held that in those circumstances it was fair to assume that the collision caused the stranding damage; the Elder Brethren had however advised that the same result might have followed, even if the alternative scheme had been adopted. *The Mellona* (2) was a still more simple case. The ship had been dismantled in the collision and stranded twenty-four hours afterwards. There the result of the collision was apparent, was obviously continuing throughout, and was a thing which would operate at once, and continue to operate, on the navigation of the ship. Similarly in cases where the vessels had been deprived of their steering gear.

But now one has to consider the facts of this particular case. Here two ships were set adrift in harbour by the admitted negligence of the defendants, and twenty minutes

(1) Swa. 211. (2) 3 W. Rob. 7.

afterwards they come into collision. The initial collision itself hardly caused any damage at all. The material question is whether the second contact was the result of the first collision. I can see no evidence that the collision caused the *Sara* to drop down upon the *Singleton Abbey*. Indeed, I think that is the result of the learned President's finding, because he says he has consulted the Elder Brethren, and they advise him that in the state of things he has described they cannot say that the *Sara* was to blame for this collision, but they cannot tell him why it probably was that the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*. That is the first point. In the second place, it seems to me that there is no evidence to show that the collision with the *Paludina* caused the propeller blades of the *Singleton Abbey* to be moving at the time the *Sara* came in contact with her on the second occasion. More than that, we have now the advice of our assessors—with which I entirely agree—that the accident was in fact caused by the negligence of the master of the *Singleton Abbey*. I appreciate that in occasions of difficulty the Court should look very benevolently upon the exercise of a mariner's ordinary care and skill. The question always is whether he has been guilty of negligence; but, in estimating the care and skill he has to employ, the Court must look at the surrounding circumstances and measure the degree of care and skill by the particular circumstances of responsibility, anxiety and sudden emergency. But here, after taking that into account, we are advised that the master of the *Singleton Abbey* was negligent in not stopping his propeller when he saw the *Sara* in the position in which she was. As to that, I think there can be no doubt about the matter. The damage could have been avoided by the exercise of reasonable care and skill, and, if it could, it is impossible for the owners of the *Singleton Abbey* to say that this propeller damage was in fact occasioned by the initial negligence of the defendants. For these reasons it appears to me that the appeal should be allowed.

The exact form of the order must be settled, because there is a question of costs. The proper order would seem to be

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a declaration that the *Paludina* is not responsible for the second collision between the *Sara* and the *Singleton Abbey*; that finding to be treated as an issue, and the costs so far as they have been increased by that issue to be borne by the respondents; and the appeal here allowed with costs.

Appeal allowed.

Solicitors for the appellants: *Waltons & Co.*

Solicitors for the respondents: *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

E. C. M. T.

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ADMIRALTY.

THE HOPPER No. 13.

Shipping — Practice — Discovery — Production of Document coming into Existence in ordinary Course of Office Routine for Purpose of furnishing Solicitor with Evidence—Privilege—R. S. C., Order XXXI., *r.* 1.

In obedience to general instructions issued by the Port of London Authority to the masters of their vessels that, in the event of a casualty, the circumstances of the occurrence were to be reported on a printed form supplied for the purpose, the master of one of the Authority's dredgers reported the details of a collision with a sailing barge belonging to the plaintiffs. The form was headed, "Confidential report for the information of the Authority's solicitor. . . ." The report was sent to the master's superior officers, who passed it on to the manager of the Authority's insurance department, and he in turn sent it to the solicitors who acted for the Authority's underwriters.

The plaintiffs contended that the report must be produced:—

Held, that there having been a collision it was to be anticipated that there would be litigation, and that, although the report went through various hands, it was made for the purpose of being put before the solicitors; that the report therefore complied with the tests laid down by Buckley L.J. in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* [1913] 3 K. B. 850, 856 and was privileged from production.

APPEAL from an order of the judge of the Mayor's and City of London Court, reversing a decision of the registrar refusing to order the defendants, the Port of London

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Authority, to make a further and better affidavit of documents.

On March 13, 1924, a collision took place between the plaintiffs' sailing barge *Promptitude* and the defendants' dredger *Hopper No.* 13. Litigation followed, and the usual orders for discovery were made. In one of the letters disclosed by the defendants reference was made to a report "received from *Hopper No.* 13 in connection with the collision." Thereupon the plaintiffs asked for the production of this report, and, on the defendants refusing to produce and claiming privilege, the plaintiffs applied to the registrar of the City of London Court for a further and better affidavit of documents by the defendants. The report was made by the master of the hopper on a printed form headed "Confidential report furnished for the information of the Authority's solicitor in view of anticipated litigation, in respect of a casualty occurring between the Authority's . . . . and the . . . ." It was made in obedience to general instructions issued by the Authority to the masters of all their craft that they were to make a report in triplicate on the form provided "immediately after every casualty." By arrangement with the underwriters who underwrite the Authority's collision risk the report was sent to a firm of solicitors who invariably acted for the Authority and the underwriters in collision cases.

The learned judge, in a considered judgment, said that he was satisfied that had it not been headed as it was, and apart from the further fact that it disclosed the names of the defendants' witnesses, the report was not a document for which privilege could properly have been claimed. It was not a case comparable with *Collins* v. *London General Omnibus Co.* (1), in which the circumstances were such that a claim was (to use the words of Wills J.) "as near a moral certainty as possible." He thought that the words of Hamilton L.J. in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (2) had a material bearing. After pointing out the necessity in any large

(1) (1893) 63 L. J. (Q. B.) 859. (2) [1913] 3 K. B. 859.

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business organization of written records being regularly made of every detail and every occurrence, common and uncommon, the Lord Justice observed that "to hold such documents privileged merely because it can be shewn of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice." The Port Authority's reports made on these forms went to the Authority, and thence might or might not find their way to the Authority's solicitors, or to some department of the Authority's business. It all depended how matters developed. He thought the claim for privilege had not been made out, and reversed the order of the registrar.

The defendants appealed. On the appeal, in order to avoid an adjournment for further evidence on affidavit as to the precise facts as regards the course of business in connection with these reports, by consent, the manager of the defendants' insurance department was called. He stated that in case of every accident afloat a report by the master of the vessel concerned was made on one of the forms provided. The report was sent first to the dredging superintendent, who passed it on to the chief harbourmaster. He in turn passed it on to the witness, who instructed the underwriters' solicitors. Sometimes he reported to the underwriters, but he had full discretionary powers, and the underwriters did not expect him to send every report to them. In every case of collision with a third party's vessel, however, he sent the report to the solicitors.

C. R. Dunlop K.C. and *Alfred Bucknill* for the appellants (defendants). It is not contended that the mere fact that the report is headed "Confidential," and that it contains the names of witnesses, makes the report privileged, if, apart from those facts, it would not be privileged; but these circumstances show that it was furnished for the information of the solicitors. A document stating what evidence can be

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given is obviously prepared in order to be communicated to the solicitor: see per Cotton L.J. in *Southwark Water Co.* v. *Quick.* (1) The test as to a document being privileged within the meaning of Order XXXI., r. 1, is whether it was bona fide made or obtained for the purpose of being used by the solicitor in an anticipated litigation: *Adam Steamship Co.* v. *London Association Corporation* (2); see also the judgment of Buckley L.J. in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (3) The facts in the present case are very similar to those in *Collins* v. *London General Omnibus Co.* (4), where the report of an omnibus conductor to his employers was held privileged.

Claughton Scott K.C. and *Trapnell* for the respondents (plaintiffs). This report does not comply with the tests laid down in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (3) It was not called into existence in order to be sent to the solicitors. It was made in the ordinary course of the master's duty to his employers; it then passed through the hands of various persons in the defendants' office, and they decided whether it should be sent on to the solicitors. On the facts the case is similar to *Cook* v. *North Metropolitan Tramway Co.* (5), where the daily report of the conductor made in the ordinary course of his duty was held not to be privileged. In *Collins* v. *London General Omnibus Co.* (4) the report was obviously made in order to obtain advice from the company's solicitors. The present case is governed by the decision of the House of Lords in *Jones* v. *Great Central Ry. Co.* (6), where communications made to agents who had to decide upon them whether to employ a solicitor, were held not privileged. See also the observations of Pickford J. in *Polurrian Steamship Co.* v. *Young* (7), where he said that he had "very great doubts" whether privilege could be claimed for letters written

(1) (1878) 3 Q. B. D. 315, 321.
(2) [1914] 3 K. B. 1256.
(3) [1913] 3 K. B. 850, 856.
(4) 63 L. J. (Q. B.) 428.
(5) (1889) 6 Times L. R. 22.
(6) [1910] A. C. 4.
(7) (1914) 109 L. T. 905.

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under general instructions that whenever a master got into difficulties out of which any trouble might arise, the letters were to state that they were for the benefit of the solicitors, although at the time it was not known whether solicitors would be instructed or litigation ensue. This is an attempt by the Port Authority to get out of the prima facie duty to produce all the relevant documents by preparing a printed form, which on the face of it makes the report appear to be a confidential and privileged document.

No reply was called for.

THE PRESIDENT (SIR HENRY DUKE). This is an appeal from an order of the learned judge of the Mayor's and City of London Court in a matter of discovery. The action in which the order was made was between the owners of the barge *Promptitude* and her cargo and the Port of London Authority in respect of an alleged delinquency by the servants of the Authority on board the *Hopper No.* 13. In the course of the litigation a question arose as to discovery of documents, and by reference to a disclosed document it was learnt that there had been a report by the master of the dredger upon the collision which was the subject of the litigation. Thereupon application was made that there should be a further affidavit of documents disclosing that report. No question arises here as to the exact form of the proceedings before the registrar in the City of London Court or of the appeal to the learned judge, and there is no question as to whether there should not have been an additional application for a further affidavit, or an application for inspection. The sole question is whether upon the facts, as the Court knows them, this document ought to have been produced for inspection by the defendants to the plaintiffs.

The facts are as follows: The Authority own large numbers of craft, including dredgers, and employ their own servants in charge of their craft. In view of the almost inevitable certainty of litigation where there is a collision between craft of the Authority and the craft of any other owner the Authority have adopted a particular form of procedure with

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respect to reports by the masters of their craft in cases of collision. They treat a collision as a case in which—in default of settlement—litigation must almost inevitably follow. Taking that view of the matter the defendants have given directions to their various officers. We have learnt with particularity how it is done—that wherever there is a collision the master of the Authority's craft which is in collision shall prepare a report to be considered by the solicitors. There are also arrangements by which the defendants have their own claims department and deal with claims in respect of collisions. They underwrite the risk in respect of collision, and have an arrangement with the underwriters, whereby in all cases of claims in respect of collision they put the management of the claim in the hands of certain solicitors—solicitors to whose employment the underwriters assent, or it may be whose employment is proposed by the underwriters and acquiesced in by the Authority. The Authority direct that a report upon such a casualty as is here in question shall be made by their servants for the purpose of being submitted to the solicitors, who for that occasion are their solicitors, to be dealt with by them in the course of their professional duties for the protection of the Authority in respect of the claim arising out of the particular collision. I take those to be the facts; and it seems to me that when the facts are ascertained the case clearly comes within the principle which is enunciated by Buckley L.J. in *Birmingham and Midland Motor Omnibus Co., Ld.* v. *London and North Western Ry. Co.* (1) The test is, the Lord Justice said, was the document obtained for the solicitors "in the sense of being procured as materials upon which professional advice should be given in proceedings pending, or threatened, or anticipated"? Was this report obtained for the solicitors? Yes, the master was directed by his employers, in such an event as a collision, to make a report for the information of the solicitors; the solicitors were identified in advance. Was it procured as material upon which professional advice should be taken? Yes, the

(1) [1913] 3 K. B. 850, 856.

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Authority had determined that, when there were claims in respect of collisions, time, trouble and expense could be saved by their being dealt with by the solicitors. Was it obtained as materials for professional advice in proceedings pending, threatened, or anticipated? Yes, the defendants intelligently anticipated that where there was a collision between one of their craft and some craft of another owner, if they could not settle the claim it would be litigated. It seems to me that this report satisfies the tests which are laid down in the concise statement of the learned Lord Justice. So far as my own mind on the matter is concerned, the Court has exercised—as the learned judge did—and I think it is the Court's duty—the right of examining the particular report, and looking at its terms I cannot have the least doubt that it was prepared in anticipation of litigation. I do not propose to state all its contents—it would be improper to do so—but it is prepared in such a way that it is useful in case of a claim, and it gives the very information which an experienced person would look for if a claim were to be made. That being so, I think that this document is protected from production, and, the parties having agreed that that should be decisive of this case, the appeal must be allowed.

HORRIDGE J. I agree. In this case the Authority, having a number of craft, give instructions to their servants to make a report in triplicate by means of carbon paper immediately after every claim. The form of report is set out in a book which is supplied to the servant in charge of the craft. We can look to some extent at what that document contains, because the printed forms have been put in. I do not say the actual report made in this case, but the printed forms on which the report has been made, have been put in, and those forms constitute something very like a preliminary act. They inquire the names of the witnesses on the Authority's vessel and the names of other witnesses, what lights, if any, were exhibited on the Authority's vessel, what lights were visible on the other vessel, what sound signals were given by the Authority's vessel, and what sound signals were heard

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from the other vessel, and when. That is the sort of information which a solicitor who is advising on a collision case wants at once, and those are some of the particulars which are required to be set out in the printed form. What happens to the printed form ? When a casualty takes place the report is sent to the dredging superintendent, who sends it to the chief harbourmaster, who in turn hands it to the witness who was called before us to-day. He told us that in every case in which there is a claim in which a third party is involved that report is sent to the solicitors for the underwriters. It is suggested that he does this in order that they may advise as to whether the underwriters are liable to the Authority. It seems to me there is no suggestion in the evidence of anything of the kind. The report is sent to them because, being solicitors for the underwriters for the Authority, they advise the Authority in a defended case that their case will be defended at the risk of the underwriters. If that be so, is that a document privileged from production? It seems to me to come exactly within the language of Buckley L.J., to which the President has referred in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (1), where the Lord Justice says : " If it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated." The learned judge in the Court below laid stress upon some language which is to be found in the judgment of Hamilton L.J. I do not think, however, that the Lord Justice was laying down any general proposition there. What he was dealing with was the form of the claim contained in the affidavit as drawn, and he pointed out that that claim would extend to matters which clearly would not be privileged; but when he goes on to deal with particular documents before him he decides it, not on the form of the claim, but upon the documents, and concludes his judgment by saying, speaking of the learned judge below : " He has drawn his distinguishing

(1) [1913] 3 K. B. 850, 856, 861.

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line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptional, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins* v. *London General Omnibus Co.* (1), at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably ensue."

In this case it seems to me clear that where there is a collision between vessels it is almost certain there will be a claim by one or other of them, or by both of them, and under such circumstances the Authority have provided that they shall have an immediate report to be laid before their solicitors. That was what happened in this case, and the document comes within the decision of the Court of Appeal, to which I have referred, as being a privileged document and one not liable to inspection.

Appeal allowed.

Solicitors for the plaintiffs: *J. A. & H. E. Farnfield.*
Solicitors for the defendants: *Pritchard & Sons.*

(1) 63 L. J. (Q. B.) 428.

E. C. M. T.

ADMIRALTY.

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Dec. 9, 17.

THE MEANDROS.

Shipping—Salvage—Services rendered to Vessel requisitioned by foreign Government—Action in rem—Maritime Lien—Benefit to Owners of salved Vessel.

A Greek steamship owned by the defendants, a Greek company, was requisitioned by the Greek Government during the war in 1922 between Greece and Turkey. Under the terms of requisition the possession and control of the vessel passed to the Greek Government, and the master and crew ceased to be employed by the defendants and were conscripted into the Greek forces. At the end of the period of requisition the vessel had to be returned to the defendants in the same condition as at the beginning of the period. While under requisition the vessel stranded, and was saved from possible total loss by the services of the plaintiffs' salvage ship. After the vessel had been returned to her owners she was arrested by the plaintiffs in an action in rem.

The defendants contended that having regard to the terms of requisition the Greek Government were to be regarded as temporary owners of the vessel; that the services, therefore, did not give rise to a maritime lien, and that the claim for salvage was not enforceable against the defendants, who derived no benefit from the services:—

Held, that the terms of requisition did not dispossess the defendants of their property in the vessel; that the services were of benefit to the defendants, as thereby they had their vessel instead of merely a claim against the Greek Government; that as the services were not those of the crew of the Greek vessel, it was immaterial that the crew were the servants of the Greek Government, and that the defendants were liable to the plaintiffs for salvage.

ACTION OF SALVAGE.

The plaintiffs were the Neptun Company, owners of the salvage steamship *Belos*, her master and crew, and the Scandinavian Salvage Union, a combination of three salvage companies, including the Neptun Company. The defendants were the owners of the Greek steamship *Meandros*, a vessel of 2468 tons gross, which had stranded in the open harbour of Moudania on the coast of Asia Minor, where she was engaged in taking away refugees after the Greek defeat at the hands of the Turks in September, 1922. She was of the value of 30,000*l*.

The services of the plaintiffs, which are fully set out in the judgment, consisted in working the *Meandros* out of the

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sand in which she was embedded and towing her away to a safe anchorage.

The defendants pleaded that at all material times the *Meandros* was under requisition to the Greek Government, and by the Greek law which applies to such requisitioning, the management, possession and benefit of the vessel passed to the Greek Government; her master and crew ceased to be in the employ of the owners and were solely in the employ and pay of the Greek Government; and the vessel was solely at their risk and had to be returned by them in the same condition at the end as at the beginning of the period of requisition. The defendants further pleaded that the *Belos* was engaged under a contract between the respective masters, the owners of the *Belos*, and the Greek Government to which the defendants were not parties, and that they derived no benefit from the plaintiffs' services.

Bateson K.C. and *Balloch* for the plaintiffs. The Greek Government is not concerned in the case, and no question of immunity from arrest or non-attachment of the salvors' maritime lien arises. On the facts the Greek Government repudiated the salvage agreement, and the action was not instituted until after the vessel was freed from requisition. The defendants' rights of ownership were not displaced under the terms of requisition: see, as to the effect of requisition, *The Broadmayne.* (1) The services benefited the defendants, as their vessel was saved from possible total loss and almost certain capture at the hands of the Turks, and it is immaterial that the defendants might have had some claim against the Greek Government in the event of the vessel's loss.

C. R. Dunlop K.C. and *I. H. Stranger* for the defendants. No lien for salvage can attach in respect of services rendered to a vessel requisitioned or chartered to a foreign Government and in their possession and control; they are in the position of temporary owners. If no lien attaches, the vessel cannot be subsequently arrested when returned to private ownership: *The Tervaete* (2); see also *The Sylvan Arrow* (3), where it

(1) [1916] P. 64 (2) [1922] P. 259. (3) [1923] P. 220.

was held that no action in rem would lie against the owners of a vessel in respect of a collision which occurred while she was requisitioned to the United States Government. The persons who receive the benefit, and they only, are liable for salvage, i.e., the Greek Government, for the vessel was at their risk.

Balloch in reply referred to *The Sarpen.* (1)

[Reference was also made to *The Lomonosoff.* (2)]

Cur. adv. vult.

Dec. 17. THE PRESIDENT (SIR HENRY DUKE). In the course of the war between Greece and Turkey, and in the month of September, 1922, the *Meandros* had been requisitioned by the Greek Government to assist in bringing away troops, part of a defeated army, and refugees, part of a population flying before the Turkish advance. After the requisition she was sent to Moudania, a port on the Sea of Marmora, on the north coast of Asia Minor. While there she stranded on a sandy shore, and although efforts were made by such assistance as was available locally—and there were craft of all kinds in the neighbourhood attracted by the necessity which had caused the *Meandros* to be there—she had remained stranded, and had become sanded up to a very considerable extent ; she was sinking, and was getting into a worse condition. The state of the sand which forms the shore there was described by the master of the *Meandros*, and though it had something of the character that one associates with a quicksand it was not a quicksand in the sense in which the phrase is commonly used, but sand shifting with the weather. The shore there is exposed, with no shelter from the north, south or east. The *Belos* was sent from Constantinople. She is the property of a firm who are part of a salvage association ; she is well equipped for salvage—a vessel of a class which it has always been the object of the Court to encourage. She was lying ready with steam up, and she came on to the scene and laboured there

(1) [1916] P. 306. (2) [1921] P. 97.

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from the afternoon of September 9 until the morning of September 11, at first with no success. She towed and jerked and produced no result in that way, but ultimately it appeared to her master that the proper course was to deal with the sand, and by using his engines he, as he says, dredged the sand—he really scoured and shifted the sand and increased the depth of water available for the *Meandros*, and after conducting that operation for a considerable period during the night of the 10th, on the morning of the 11th he was able to bring the vessel off. She thereupon rendered very material service. She was forthwith crowded with refugees of various classes to the number of something like I think 1100, and got away with them. They were rescued in time to avoid the arrival of the Turkish troops, but the closing operations in the scene were conducted to the accompaniment of artillery fire which was going on in the neighbourhood of the heights, and the Turks arrived and took possession of the town, it is said, within forty-eight hours.

Looked at in that way, and on broad grounds, it is obvious that the *Belos* rendered a highly important and valuable service in the way of salvage to somebody; but although her service was rendered in September, 1922, her owners have laboured in vain until this time to secure remuneration, and they are met now with defences which render it necessary to look with some care at the documents and the facts in order to see whether the principles of law upon which salvage is based give the *Belos* a claim which could be, and ought to be, enforced in this Court. Various defences were raised. It was said the vessel was a requisitioned ship and in effect that she and her crew thereupon passed to the Greek Government. It is not pleaded that the property in her passed, and I think the learned pleader very naturally shrank from any such allegation as that, but it is pleaded that the management of her, the possession, the benefit and the control of her and of her crew passed. Then it is pleaded that at the time of the service the vessel was solely at the risk of the Greek Government, and that the Greek Government were

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under an obligation to return her in the condition in which she had been delivered to them. It is also pleaded that no benefit was derived by the defendants; that these services were rendered under a contract with the Greek Government, and that the proper proceeding is by way of a claim upon the Greek Government—a claim to their consideration as a sovereign State—and to their sense of justice in respect of the claim.

First, as to the contract. The master of the *Belos*—who is experienced in salvage matters—took with him Lloyds form, and presented it to the master of the *Meandros*, who thereupon took him to a Greek officer in command of a Greek department. He signed the salvage form in blank. It provides for an award of salvage to be paid by the Greek Government after arbitration. What may be said about that agreement is, I think, that if it had been put in order by the Greek Government—if they had, as the Scotch say, "implemented" it—and if they had performed all its terms, in my judgment it would have afforded an answer to the present claim. But what took place was that before the salvage service had really commenced the Greek officer on the spot repudiated the agreement, and so it has never been completed; and the Greek Government say that when appeals were made to them, their agents in London expressed reasons why, in the existing state of political affairs, nothing could be done in the matter. I think, therefore, the action stands as if there had never been an attempt to make an agreement—it is a repudiated agreement of the third parties.

The next question is as to requisition. The effect of requisition may be of the most various kinds. It is not an operation of stereotyped form. Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became familiar twenty-five years ago—the term "commandeering." A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is

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infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed; if premises are requisitioned they are requisitioned to be occupied; and if a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day. I have looked at the requisitioning document and listened to arguments on the Greek law. Regarding the Greek law as a matter of fact, I do not think the defendants have made out their allegation. But there is something more than that, because I am able to see by the document what actually was the effect of requisition in this case. The first step in the requisition was a demand by the Greek Government for a delivery of this ship, and I am satisfied that for every practical business purpose the ship was taken possession of by the Greek Government—that is that they required that the ship and her master and crew should be at their service for the purpose for which they required them. Later, after the services for which the vessel was required had been completed—namely, in January, 1923—the submanager of the Greek Direction of Transport redelivered her to the owners' agent. That having taken place in January, 1923, in the following month there were proceedings before what I may call a statutory tribunal—not one of the Civil Courts, but a statutory tribunal appointed to examine and assess accounts upon requisition. On February 2, 1923, that tribunal awarded a payment to the owners of the *Meandros* in respect of the requisition, for a period from August, 1922, to January, 1923, a period of 135 days, at 4671 drachmas per day. They treated the transaction, on the face of that account, as a hiring transaction. The ministry was debited, in respect of the requisition and use of the vessel, with 635,585 drachmas. That seems to me to be a safer guide with regard to the effect of the requisition than I can find in the conflict of the arguments of the Greek advocates who have made affidavits. The possession of the vessel and the control of her passed for the time being; for her crew, by the act of requisition, became conscripts in the

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Greek forces, and came under the lawful authority of Greek commanders. The property in her did not pass. It is obvious, upon the facts being examined, that the owners of the *Meandros* never were disseised, in the technical sense, of property in her. All they were deprived of for the time being was the use and possession of her.

Next it is said that the salvage services produced no benefit to the defendants. Now the contrast between the position at the time when the service was about to be performed, and the period when it had been completed, is, that at the time when it was about to be performed the *Meandros* stood a strong probability—as I have been advised by the Elder Brethren—of becoming a total loss by reason of the prevailing conditions—by reason partly of the paralysing influences which affected the rescue owing to the Turkish approach. The Elder Brethren advise me that as things went on, but for the services of the *Belos* there was a strong probability that the *Meandros* would have been a total loss—that she would have been embedded in the sand, and, upon a change of weather, deeply embedded, and she would have been rendered useless as a vessel. That was the possibility, and if that had been realized, according to the defendants' contention the owners would have had a claim against the Greek Government. I am not at all sure that the Greek Government regarded that claim as one by which it was bound. According to the statement of an agent of the Greek Government in London the risk was a matter for the owners, and not for the Government; but, taking it at its highest, the owners would have had a claim which they could have presented to the arbitral tribunal which I have mentioned, a claim which could have been assessed and in respect of which they would then have had a claim in moneys numbered. That might have been their position. As the result of the salvage they have their ship and not a claim, and to say that they derived no benefit from the salvage services seems to me to be illusory. In my judgment benefit was derived by the services.

What is the result—who is to pay? If the Greek Government had been a corporation subject to national law there

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would have been a claim against them. They were in the possession of and had an interest in the ship. They had temporary control of her, and the right to possession of her, and, upon the principles which are administered in Courts possessing Admiralty jurisdiction, salvage creates a legal liability arising out of the fact that a property has been saved whereby the owner, who has had the benefit of the service, has to make remuneration to those who have conferred the benefit. It has been said, more widely than it is necessary to express an opinion upon in this case, that any person whose interest in the property is real—though it fall short of ownership—may be liable in respect of salvage, and it has been said, further, in comprehensive terms, that "owner" includes all persons who are collectively or singly owners. The defendants in this case were the owners in the true sense, and at all material times, although I accept the contention of the defendants that for a period they were out of possession and out of control. On that question of control I take account of the argument founded upon the decision of the Court of Appeal in *The Tervaete* (1) and other well-known decisions, that if the act in respect of which reward is being claimed was the act of the crew while they were servants of or under the control of the Greek Government, it would not result in a claim capable of being enforced in salvage proceedings, because neither the Greek Government, nor the vessel in their hands, nor the Greek Government in respect of acts of the crew under their control, nor subsequent owners in respect of these transactions could be made liable in subsequent proceedings. But that is not this case. Nothing is claimed here in respect of any act of the crew of the *Meandros*. What is claimed is salvage in respect of the services of the *Belos* and her master and crew. The judgment of Sir James Hannen in *Five Steel Barges* (2) and the judgment of the Court of Appeal in *The Port Victor* (3) will be found to be ample authority for the principle on which I am proceeding.

(1) [1922] P. 259. (2) (1890) 15 P. D. 142.
(3) [1901] P. 243.

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The service in this case was beneficial to the owners, and the question is what ought to be the reward. The service was of the high value which I have endeavoured to describe. I am anxious not to exaggerate the claim by reason of military danger so as to reward the claimants for intervening in a military operation. I think that would not be proper in the circumstances of this case; but the claimants intervened in difficult circumstances, and, in my judgment, the lowest amount I can reasonably award them is the sum of 2500*l.*

Solicitors for the plaintiffs: *Wm. A. Crump & Son.*
Solicitors for the defendants: *Downing, Middleton & Lewis.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

C. A.

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Feb. 9.

THE JUPITER (No. 2).

Shipping—Possession Action—Foreign Vessel—Foreign Parties—Jurisdiction—Discretion—Impleading Foreign Sovereign State—Plaintiffs an alleged non-existent Russian Company—Authority to sue in Plaintiffs' Name—Motion to set aside Writ.

By a contract of sale made in London, an English company on behalf of the Soviet Government purported to sell the steamship *Jupiter* to the defendants, an Italian company. The vessel had belonged to a Russian company, but the Soviet Government asserted that by a decree of nationalization all vessels of the Russian mercantile marine had become State property, and that the company had ceased to exist. The Russian company had moved its business to France, and an action in rem was brought in its French name, and in the name of the persons appointed by the French Courts to administer its affairs, against "the steamship *Jupiter*," claiming possession. The Italian company entered an appearance and moved to set aside the writ on the following grounds:—

(*a*) That as the action was between foreigners for the possession of a foreign ship, and had been instituted without the consent of the defendants or any request from the representative of the foreign State of which either of the parties was a national, the Court had no jurisdiction, or, in the alternative, ought not to entertain the action.

(*b*) That the action indirectly impleaded a foreign sovereign State.

(*c*) That the Russian company having ceased to exist, the persons instructing the plaintiffs' solicitors had no authority to give instructions for the action to be instituted on behalf of the company:—

Held, (*a*) That there is no established rule that the Admiralty Court

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will not entertain possession suits in respect of foreign vessels except at the request of both parties or with the consent of the accredited representative of the country to which the vessel belongs; the matter is one for the discretion of the Court;

(*b*) That these proceedings did not implead the Soviet Government directly or indirectly;

(*c*) That the question of authority to institute the action was a matter which should be referred to the judge at the trial; and

(*d*) That accordingly the motion to set aside the writ failed.

APPEAL from a decision of Duke P. refusing to set aside a writ and all subsequent proceedings in an action in rem.

By a writ in rem directed to "the steamship *Jupiter*" the Compagnie Russe de Navigation à Vapeur et de Commerce (and three other persons added by way of amendment to the writ under circumstances referred to later), "as sole owners of the steamship *Jupiter* of the port of Odessa," claimed to have possession of her decreed to them. To this writ an unconditional appearance was entered on behalf of "the steamship *Jupiter* and/or Cantiere Olivo Società Anonima, the owners thereof."

The events leading up to these proceedings were as follows. From a date prior to 1917 a company incorporated in Russia in 1856, the name of which translated into French was La Compagnie Russe de Navigation à Vapeur et de Commerce (hereinafter referred to as "the plaintiffs"), were the sole owners of the *Jupiter*. Their head office was at Petrograd, but their headquarters were at Odessa, where their vessels were registered. In the beginning of 1919 the plaintiffs transferred their headquarters and all their vessels from Odessa to Marseilles. The *Jupiter* was engaged in trading until December, 1920, when the plaintiffs laid her up at Plymouth. In September, 1922, she was taken from Plymouth to Dartmouth, where she remained laid up until the time of the present proceedings. While she was laid up the master, chief officer and chief engineer remained on board in the employment of the plaintiffs, by whom they were duly and regularly paid their wages. In March, 1924, the master, without the knowledge of the plaintiffs, handed over the *Jupiter* and her papers to a representative of the Union of

Socialist Soviet Republics, and refused thereafter to recognize the plaintiffs as owners.

Thereupon the plaintiffs issued a writ in rem claiming possession of the vessel. The writ in that action was directed to "the steamship *Jupiter* and all persons claiming any right or interest in the said steamship." An appearance under protest was entered by the Union of Socialist Soviet Republics, who moved to set aside the writ on the ground that they were the owners of the vessel under a decree of nationalization of January 26, 1918, nationalizing the Russian mercantile marine, and that as a recognized sovereign independent State they declined to sanction the proceedings. Hill J. held that the issue of a writ in rem against a vessel in which a foreign State claimed an interest in effect impleaded the foreign State, and he accordingly set the writ aside. On July 17, 1924, this decision was affirmed by the Court of Appeal. (1)

On September 18, 1924, the Arcos Steamship Co., Ld., of London, acting on behalf of the Soviet Government, purported to sell the *Jupiter*, which was still lying at Dartmouth, to the defendants, Cantiere Olivo Società Anonima, an Italian corporation. The sellers, the Arcos Steamship Co., agreed to indemnify the buyers against any claims against the vessel in British or Italian Courts by third parties arising out of any circumstances prior to delivery to the buyers. On October 8, 1924, the plaintiffs issued the writ in the present action, to which the defendants appeared and gave bail. On November 18 the statement of claim was delivered, in which the plaintiffs claimed (i.) a declaration pronouncing them to be the lawful owners of the vessel and (ii.) possession. On November 21 the defendants served notice of motion to set aside the writ and all subsequent proceedings on a number of grounds, those material to this report being :—

(*a*) That the action was between foreigners for the possession of a foreign ship, and had been instituted without the consent of the defendants and without any request from the representative of the foreign State of which

(1) [1924] P. 236.

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either of the parties was a national, and that the Court had no jurisdiction or alternatively ought not to entertain such an action.

(*b*) That by a nationalization decree of the Soviet Government the ship became their property; and that the plaintiff company, which consisted of Russian nationals, had ceased to exist.

[In support of these contentions the defendants filed an affidavit by the Chargé d'Affaires in this country of the Union of Socialist Soviet Republics.]

(*c*) That the ship having been sold by the Soviet Government to the defendants free from incumbrances and maritime liens, to allow the action to proceed would be indirectly to implead a foreign State.

When the motion came before the Admiralty Court on December 11, 1924, the defendants further contended that as the plaintiff company had ceased to exist, the persons instructing Messrs. William Crump & Son, solicitors for the plaintiffs, had no authority to give instructions for an action to be instituted on behalf of the plaintiff company. The learned President thereupon gave leave to the plaintiffs to amend their writ by adding the names of the persons whom the Tribunal of Commerce of Marseilles had appointed as administrators of the plaintiff's property and affairs. At the adjourned hearing on January 19, 1925, his Lordship declined to set aside the writ on any of the grounds of objection, but gave leave to appeal.

C. R. Dunlop K.C. (*Dumas* with him) for the appellants. This is an action in rem between two foreigners relating to the title to a foreign ship, and under these circumstances the Admiralty Court has no jurisdiction unless invited to try the action by the duly accredited representative of the country to which the ship belongs or both parties consent: *The Martin of Norfolk* (1); *The Johan and Siegmund* (2); *The See Reuter.* (3)

(1) (1802) 4 C. Rob. 293. (2) (1810) Edw. 242.
(3) (1811) 1 Dods. 22.

[ATKIN L.J. referred to s. 4 of the Admiralty Court Act, 1840.]

Assuming that section gives jurisdiction to try a possession suit of this nature, Sir Robert Phillimore used to decline to exercise jurisdiction except under the conditions above stated: see *The Agincourt* (1) and *The Evangelistria*. (2)

[BANKES L.J. In *The Annette* (3) Hill J. said that in his opinion all those cases were somewhat out of date, and that the reasons for exercising discretion by refusing to entertain the suit are much less strong in modern times.]

In *The Annette* (3) in fact there was a request to the Court by the Government of the country to which the ship belonged to exercise jurisdiction. See also the observations of Scrutton L.J. in *The Jupiter* (4) on this point.

This writ indirectly impleads the Soviet Government, as the title of the purchasers from the Soviet Government is impugned. The learned President in his judgment said: "The defendants relied upon the decree of the Government of Russia whereby the corporation in question (the plaintiffs) purported to be extinguished. Without examining the facts of that transaction it would be impossible to say whether the Soviet Government had purported to extinguish this corporation." But that is exactly what the Courts of this country will not do: see the observations of Scrutton L.J. in *Luther* v. *Sagor*. (5) If the Russian company has ceased to exist—and the truth of that allegation sworn to by the Chargé d'Affaires of the Soviet Government cannot be inquired into—the persons named in the writ as plaintiffs have no right of action. Even assuming the Russian company still exists, this action is brought, not in its corporate name, but in the name of a French company and of three persons appointed by the French Court as administrators. To allow the action to proceed under these circumstances is really an abuse of the process of the Court.

Langton and *Carpmael* for the respondents were not called on.

(1) (1877) 2 P. D. 239.
(2) (1876) 2 P. D. 241*n*.
(3) [1919] P. 105.
(4) [1924] P. 236.
(5) [1921] 3 K. B. 532, 555, 556.

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BANKES L.J. This appeal from a judgment of the President raises several important questions. In an action brought in rem against the steamship *Jupiter*, the plaintiffs raise the question as between themselves and all persons interested in the *Jupiter* as to the ownership and the right to possession of that vessel, and they claim a declaration covering both those points. Appearance was entered unconditionally, and the matter proceeded for a time; bail was asked for and given, and then the defendants who had entered an appearance and who claim to be the owners of the vessel by purchase from the Soviet Government of Russia lodged this motion in which they seek to get the writ and all subsequent proceedings set aside. In their notice of motion they set out the grounds at length. It is not necessary to refer to them particularly; there are nine of them, and they do not include a suggestion that the action is frivolous or vexatious or an abuse of the process of the Court; they are all matters going to the jurisdiction of the Court. The President decided that the action should proceed, and generally I am in entire agreement with the reasons which he has given for his decision, and with his decision itself.

Mr. Dunlop has taken three points in support of his argument that the President's view was wrong. His first point, as he originally formulated it, was that the action being an action in rem between two foreigners relating to the title of a foreign ship the Admiralty Court has no jurisdiction; but he modified that in the course of the argument, and he admitted that the Court had jurisdiction, but he sought to establish that there is an accepted rule that the Court will not exercise its jurisdiction unless with the consent of the accredited minister of the country to which the disputants belong, or if both disputants consent. Upon that point we have been referred to a number of authorities, some of which were decisions of Lord Stowell early in the last century. I do not propose to refer to them; there are three of them between the years 1802 and 1811. I do not think that Lord Stowell there lays down any rule indicating that he thought that the Court had no jurisdiction, but he did undoubtedly express the

opinion that the Court did not exercise that jurisdiction in the absence of these consents or requests, and he gave as his reason the fact that such disputes would have to be decided, or might have to be decided, according to foreign law, the ascertainment of which was in those days a matter of difficulty. He also indicated that the foreigners might not be content with the view of the law which was taken by an English judge. I think matters have progressed very far since that time, and it is common practice now for these Courts to adjudicate on disputes between foreigners and to ascertain the foreign law as a matter of fact and apply it; and I think myself that if the question ever had to be discussed at length, which is not the case here, there is a great deal to be said for the view of Hill J. as expressed by him in *The Annette* (1) in commenting upon the decisions of Lord Stowell to which I have referred. But in regard to this first point of Mr. Dunlop's, when once the admission is made that the Court has jurisdiction it becomes a matter of mere discretion on the part of the Court whether it will or will not exercise it, and in this case I entirely agree with the view of the President that, having the jurisdiction, the Court should not refuse to exercise it. That disposes of the first point.

The second point is that indirectly the foreign sovereign State is impleaded in this dispute. That argument is founded upon this view of the matter: it is said that the plaintiffs are claiming this vessel on the ground that they, a Russian company, were the original owners of this vessel registered at Odessa, and that they always continued to be and remained the owners. The defendants say: "No, that is not so. Owing to the legislation of the Soviet Government your title to the vessel has been destroyed; and by the course of Soviet legislation the vessel became the property of the Soviet Government, and they sold her to us." It is true, as the President pointed out, that in the sale to the defendants on behalf of the Soviet Government an indemnity was given against any claim that might be made to the vessel, but

(1) [1919] P. 105.

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although that is the fact, it seems to me that the President's view is right; even under those circumstances it is not true to say that the foreign sovereign State is impleaded in this action, although one may see, as the President saw, great difficulties in the way of the plaintiffs ultimately getting over the point raised by the assertion, if it is proved, that the vessel became the property of the Soviet Government and that they sold her to the defendants. That, in my opinion, disposes of the second point.

The third point is one about which it is necessary to be careful, because of the decision in the *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*. (1) In that case one of the disputes between the parties was whether the plaintiffs had any authority to commence the action or prosecute the action in the name of the Russian Bank. Incidentally a point was taken as to whether or not that contention ought to have been raised by motion, and whether it was competent for the defendants to raise the contention by plea. That matter was discussed in this Court, and on that point there was a difference of opinion, but ultimately the question was settled by the House of Lords definitely deciding that the point ought to have been taken by preliminary motion in accordance with a decision given some time ago by Warrington J., as he then was, and that it was not competent for the defendants to raise it by plea. In these circumstances it seems to me that we ought to be careful to protect the right of the parties here, and although this question of authority cannot be raised by plea, it ought to be one of the matters to be decided upon the trial; and I think it is competent for us under those circumstances to refer so much of this motion as relates to the question of authority to the judge at the trial, so that he may be properly seised of the matter which the parties desire to raise on this point. All that I need say about the question is that I certainly do not think it is made so plain that this Court ought to shut the plaintiffs out from a full consideration of that question as well as the other matters which are to some

(1) [1925] A. C. 112.

extent connected and to some extent involve consideration of the Soviet legislation.

I think, therefore, that the order of this Court should be that so much of the appeal as relates to matters other than the authority of the plaintiffs to maintain the action must be dismissed, and that so much of the appeal as relates to an application involving the authority of the plaintiffs should be referred to the judge at the trial.

The appeal will be dismissed. Plaintiffs' costs in any event.

ATKIN L.J. I agree. The first question is as to the jurisdiction of the Court to entertain this claim for possession by one foreigner against another foreigner in respect of a ship that is within the territorial jurisdiction. It appears to me now reasonably plain that there is jurisdiction in the Court to entertain such a claim. I think there was jurisdiction before the Admiralty Act of 1840, and in my opinion there is statutory jurisdiction given by that Act.

The only question that is left is whether or not there is a discretion in the Court to decline to exercise jurisdiction in such cases, and, if so, whether that jurisdiction ought to be so exercised in this case. As to that the law seems to me still to obtain that the Court in such a case has a discretion as to whether it will exercise its jurisdiction or not, and in cases where the parties both belonging to a foreign State have merely taken the occasion of the ship being temporarily here to get a question of title, which depends on the municipal laws of another country, determined by the Courts of this country, the Court may in the exercise of its discretion decline to do so. But in the facts of this case there seems to me to be no reason why the Court should not exercise its discretion and entertain the suit. The vessel has been in this country for a period of years and the question arises in respect of her disposition by a contract entered into in this country by a limited company of this country, the Arcos Shipping Company, Ld., and although questions may arise as to the right of title of the vendors to the defendants, yet

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it appears to me to be a case which can properly be tried in this country, and I see no reason for interfering with the discretion of the learned President in that respect.

The other question arises on the suggestion that this writ seeks to implead directly or indirectly a foreign sovereign. To my mind that is not the case. So far as the persons interested who have entered appearance are concerned the defendants, who contend they are the owners, are alleged to be, and undoubtedly are, an Italian company, and it is only as against them that the plaintiffs seek to have possession. The Russian Government do not claim at the moment to be the owners or to have the right of possession, though they do say apparently that they passed their title to the defendants. Under those circumstances it seems to me to be a mere question of fact or of law as to whether or not the defendants, who are not a sovereign State, have in fact got a title to this ship, and no question, therefore, of impleading the foreign sovereign arises. It was also put in another way. It was said that inasmuch as a declaration of the foreign sovereign must be taken to be conclusive as to title, and inasmuch as there is an affidavit in which the representative here of the Soviet Government says that they had a title in the ship but conveyed it to the defendants, it is frivolous and vexatious to make a claim contrary to that assertion. It appears to me that that is a question which raises points of difficulty which require further elucidation of the facts. I am not satisfied at present that the law is quite as plain as was suggested by Mr. Dunlop, and in any case the document which vouches for the delivery of the title of the ship to the defendants does not purport to convey the title from the Russian Government to the defendants, but from, as I say, an English company, the Arcos Shipping Company, Ld., and they are the people who give the indemnity.

The third point raises an interesting question about the authority to use the name of the Russian company to sue. In respect of that the matter will eventually have to be regarded from several points of view. It may be that the Russian company is dissolved, and in that case it, of course,

could not sue. That is a matter of plea. It may be that the Russian company, though not dissolved, has no longer property in the ship, because the property may have been nationalized and passed to the Russian Government. That, again, is not a matter of jurisdiction; it is a question of plea. But it may be that the Russian company, having the property in the ship, have not in fact given any authority to sue, because their administrative powers may be in the hands of persons other than those who did give the authority to sue, whoever they may be. That is not a matter of plea and is now decided to be a matter of motion, but it seems to me plainly to depend upon the determination of facts which are not before the Court at the present moment, and may require careful investigation, and therefore if that matter arises in the course of the litigation, I think it ought to be determined by the Admiralty Court. There is the further point as to the other parties who have been added by amendment. As to that again there is no question of jurisdiction but merely the question whether those persons have the right to sue or not.

For these reasons it appears to me that at the present stage the learned President was right in refusing this motion, and I think, therefore, this appeal should be dismissed.

LAWRENCE J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Wynne, Baxter & Keeble.*
Solicitors for the respondents: *William A. Crump & Son.*

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[IN THE COURT OF APPEAL.]

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Shipping — Collision — Damages for Detention — Collision with Warship — Non-profit earning Vessel—Collision Repairs and Owners' Repairs executed simultaneously—Measure of Damages—Principles applicable.

The defendants' steamship collided with H.M.S. *Cairo*, a light cruiser, and did her damage for which, in an action brought against them by the Admiralty, the defendants admitted liability and the damages were referred to the Registry for assessment.

The *Cairo* was temporarily repaired at Hankow and she then proceeded to Hong Kong for permanent repairs. She was shortly due for her annual refit at Hong Kong, and after the collision the Admiralty decided to do both sets of repairs at the same time. The collision repairs took twenty days, and the combined work occupied about eight weeks, but the refit work, which was not delayed by the collision repairs, would itself have taken the whole of this time.

The registrar held that as the refit work would not have been done till a later date, had it not been necessary to do the collision repairs, the defendants were liable to the Admiralty for the detention of the ship during the twenty days. He assessed the damages under this head at 2000*l.*—*i.e.*, 100*l.* per diem for twenty days, the amount being calculated on the basis of 5 per cent. per annum on the estimated capital value of the ship at the time of the collision. He also allowed 3800*l.* in respect of pay and allowances to officers and men. The learned President having confirmed the report, the defendants appealed:—

Held, (*a*) that the damages had been assessed on a wrong principle by applying fixed rules; (*b*) that the sole question was: what was the actual loss to the Admiralty arising from the deprivation of the use of their ship?; (*c*) that there was no rule of law that, because the refit, necessary in the near future, was executed sooner than but for the collision it would have been, the assessing tribunal was prevented from taking into account, if it were the fact, that the period occupied in doing the collision repairs enabled the Admiralty to carry out the refit, the completion of which, with reasonable certainty, would have deprived them of the use of their ship; (*d*) that there was no rule of law or practice prescribing that the amount of the damages for detention to which the owners of a warship or other non-profit earning vessel were entitled should be calculated at a fixed rate based on the capital value of the ship without regard to any beneficial user the owners might have had during the period of detention; and (*e*) that the case must be remitted to the registrar for reconsideration.

APPEAL from a decision of the President (Sir Henry Duke) confirming the report of the registrar on a reference to assess damages.

The appellants (defendants) were the owners of the steamship *Chekiang;* the respondents (plaintiffs) were the Commissioners for executing the office of Lord High Admiral of the United Kingdom (hereinafter referred to as the Admiralty). The reference arose out of a collision between H.M.S. *Cairo* and the *Chekiang* in the harbour at Hankow on August 22, 1921. On April 9, 1924, the defendants admitted liability for the collision and the damages were referred to the registrar and merchants for assessment.

Before the date of the collision the Admiralty had decided that the *Cairo* should be docked in December, 1921, for her annual refit, and a number of items of work had already been certified by her captain as "necessary for the ship's fighting and sea-going efficiency." When, therefore, it became necessary for the ship to go into dry dock for the collision repairs the Admiralty decided that she should undergo her refit at the same time. Accordingly, after temporary collision repairs had been effected at Hankow, the *Cairo* left for Hong Kong, where she was dry docked. The Admiralty refit occupied from September 7 to November 2, 1921, and during that time the repairs rendered necessary by the collision were also done. These repairs occupied, according to the finding of the registrar, twenty days, but the two sets of repairs were proceeded with simultaneously, and the *Cairo* was not delayed in any way by the collision repairs.

In addition to the cost of the collision repairs, 675*l.*, the registrar reported that 2000*l.* should be allowed in respect of the loss of use of the *Cairo* for the twenty days, and 3800*l.* in respect of pay and allowances to officers and men. The 2000*l.* was arrived at by allowing 5 per cent. per annum for twenty days on the estimated capital value of the ship at the time of the collision. In his "reasons" for the report the registrar stated as follows: "It is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision. . . . . As regards the item in respect of officers' and crew's wages there

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is evidence that they were employed to some extent on the refitment of the *Cairo*, and having regard to this fact and to the time allowed, the amount allowed for this item is reduced to 3800*l*." [The Admiralty claimed in respect of this item at the rate of 207*l*. per diem; if the full amount for twenty days had been allowed, therefore, the allowance would have been 4140*l*.] The defendants moved to reject the registrar's report as regards these two items.

The learned President said that on the evidence he had come to the conclusion that the registrar was not bound to find that, at the time it was decided that both sets of repairs should be done together, the refit work was necessary in the legal sense; and on the authorities, in order to introduce the principle of contribution for which the appellants contended, the owners' repairs must be such that the Admiralty had no alternative but to have executed. It did not apply to a case where the owners availed themselves of the ship being in dock as a convenient opportunity for doing the repairs. As regards the sum allowed for detention it was said that it was arbitrary, but he thought it was well within the method of assessment of damages which had been in operation for many years. He therefore affirmed the report but gave leave to appeal.

C. R. Dunlop K.C. and *R. F. Hayward* for the appellants. The registrar has proceeded on a wrong principle. The plaintiffs must prove, and are only entitled to receive, what they have actually lost: see the observations of Bowen L.J. in *The Argentino*. (1) There is no principle which requires the assessing tribunal to award damages for detention in the case of a non-profit earning vessel on the fixed basis of a percentage on the capital value. It is not contended that the Admiralty cannot claim for the loss of use of a non-profit earning vessel, *The Greta Holme* (2) and *The Marpessa* (3) are authorities to the contrary, but the claimants must show what user or chance of user they have lost. In this case the

(1) (1888) 13 P. D. 191. (2) [1897] A. C. 596.
(3) [1907] A. C. 241.

Admiralty have suffered no loss by detention through the collision repairs, as the *Cairo* was going into dock for her annual refit very shortly; the refit was necessary for her fighting efficiency, and in fact took much longer than the collision repairs; and she was not delayed by the collision repairs, as the two sets of operations were carried on simultaneously on different parts of the ship. This case is the converse of *The Astrakhan* (1), where the Government repairs to the warship took ten days and the collision repairs thirty-two days, and Bargrave Deane J. accordingly allowed twenty-two days in respect of detention. In the present case, therefore, nothing should be allowed, as the refit took much longer than the collision repairs. *The Astrakhan* (1) is not in conflict with *The Acanthus* (2); in that case it did not matter when the owners fitted the vessel with bilge keels, and she did not, therefore, go into dry dock on that account. The *Cairo*, however, would have had to be docked very shortly even if there had been no collision. *The Ruabon Steamship Co.* v. *London Assurance* (3) and *The Haversham Grange* (4), which followed that case, were merely concerned with the apportionment of dock dues, which stand on a different footing, as dock dues are recoverable as an item of damage. Further, in *The Haversham Grange* (4) the claim by the first tortfeasor for contribution from the second tortfeasor towards the sum allowed in respect of demurrage was abandoned, because the repairs attributable to the first collision occupied longer than the second collision repairs.

The defendants are also entitled to succeed on item 3, the allowance of 3800*l.* in respect of officers' and crew's pay. The officers and crew were largely engaged in the work of overhaul and there is no evidence that the Admiralty lost the benefit of their services. If these two items stand, instead of there being restitutio in integrum, the Admiralty will be 5800*l.* better off than if the collision had not taken place.

Bateson K.C. and *Balloch* for the respondents. The decision that the *Cairo* should refit at once was not come to until

(1) [1910] P. 172.
(2) [1902] P. 17.
(3) [1900] A. C. 6.
(4) [1905] P. 307.

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after the collision, and the refit was not immediately necessary. It is obvious that every vessel has to be dry docked at some time, but the *Cairo* would not have gone into dock at the time she did but for the collision repairs. When two sets of repairs are done at the same time, if both are essential and obligatory at that time, those items common to both must be shared proportionately: *The Haversham Grange* (1) and *The Astrakhan.* (2) But if only one is essential and obligatory that set of repairs must bear such common items as docking expenses: *The Ruabon* (3); *The Acanthus.* (4) As regards detention, even when both sets of repairs are necessary and obligatory, as between two separate tortfeasors the first in point of time bears the whole: *The Haversham Grange* (1), a case which is strongly in the respondents' favour, for if the Admiralty were a second tortfeasor instead of an innocent plaintiff, the defendants, as the owners of the first wrongdoing vessel, would be liable for the twenty days' detention; it is submitted the principle there applied should be followed in the present case. *The Astrakhan* (2), on the question of detention, appears to be in conflict with *The Acanthus* (4), and the only ground on which it can be supported is that the Danish cruiser, when run into by the defendants' vessel, might be said to be already subject to ten days' detention on her owners' account, as she was about to be dry docked for repairs, which would take ten days.

As regards the user of the ship, *The Greta Holme* (5) and *The Mediana* (6), show that it is no concern of the tortfeasor what use the plaintiff might have made of the damaged property.

[ATKIN L.J. Is no account to be taken of the user the Admiralty in fact had of the ship?]

No, because the only user they had of her was forced on them by the wrongdoer. Merely because an owner has derived some advantage he is not bound to contribute towards the expense of it: see *The Ruabon* (3) and *The Acanthus.* (4)

(1) [1905] P. 307.
(2) [1910] P. 172.
(3) [1900] A. C. 6.
(4) [1902] P. 17.
(5) [1897] A. C. 596.
(6) [1900] A. C. 113.

The latter case, it should be mentioned, has not been followed in the United States: see *The Sequoia*. (1)

As regards the basis of calculation, the registrar adopted the only practical method of assessing a claim in the nature of demurrage in the case of a non-profit earning vessel—namely, interest on the capital value, a practice which has been followed for very many years and was approved of by Lord Loreburn L.C. in *The Marpessa*. (2) As regards the allowances to officers and crew the registrar has not allowed the claim in full, he has, as he states in his "reasons," taken into account that the officers and crew were to some extent employed on the refitment. [Reference was also made to *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (*The Vancouver*) (3) and *The Kingsway*. (4)]

Hayward replied.

Cur. adv. vult.

Feb. 23. The following judgments were read.

BANKES L.J. This is an appeal from the President affirming the report of the registrar. The objection to the report is that the registrar has assessed the damages to which the plaintiffs were entitled on a wrong principle.

The claim for damages was one made by the Admiralty, arising out of a collision between H.M.S. *Cairo* and the defendants' steamship *Chekiang* at Hankow on August 22, 1921. Liability was admitted, and the question of damages was referred to the registrar and merchants. Among the items of damage claimed were the following: loss of H.M.S. *Cairo* for the period August 23 to September 27, 1921, inclusive; i.e., thirty-six days at 100*l*. per day, 3600*l*. Pay and allowance of officers and men of H.M.S. *Cairo* for the above period, 7460*l*. 17*s*. 4*d*.

The report of the registrar so far as is material is as follows: "The *Cairo* so far as can be ascertained, after the collision still fulfilled the purpose for which she was stationed at

(1) (1904) 132 Fed. Rep. 625.
(2) [1907] A. C. 241.
(3) (1886) 11 App. Cas. 573.
(4) [1918] P. 344.

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Hankow and no evidence has been given to prove any loss to the Crown during that period. As regards the later period, it is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision work. . . . . The conclusion to which the merchant and myself have come is that a reasonable time to allow from September 3 is twenty days. As regards the item in respect of officers' and crew's wages, there is evidence that they were employed to some extent on the refitment of the *Cairo*, and having regard to this fact and to the time allowed, the amount allowed for this item is reduced to £3800."

It is plain from the language used that in arriving at the above decision the registrar considered that he was acting upon a settled principle. The word "therefore" plainly indicates this. The President took the same view. In dealing with the question of liability, as opposed to the question of amount, he sums up his decision in these words: "I come to the conclusion therefore that upon the crucial question of fact and upon the crucial principle of law, my judgment ought to be against the appellants." The objection of the appellants to this judgment, and to the report of the registrar, is that under the two heads above mentioned no damages at all should have been awarded, or alternatively a very much smaller sum, and that the amount of the damages has only been arrived at by applying a principle which has no application to the case.

I speak with hesitation upon a point with regard to which the experience of the registrar and of the President is so much greater than my own, but after listening to the arguments which have been addressed to us, and to the cases which have been cited, it does appear to me that some confusion has crept into the practice as a result of treating as applicable to such a case as the present decisions which were given under entirely different circumstances. The President treats *The Haversham Grange* (1) and *The Acanthus* (2) as the governing

(1) [1905] P. 307. (2) [1902] P. 17.

authorities; and the report of the registrar indicates that he adopted the judgment in *The Acanthus* (1) as indicating the principle upon which the damages in the present case should be assessed.

It is, I think, necessary to go back to the governing principle laid down in such clear language in *The Argentino* (2), and recently applied in *The Valeria.* (3) The rule there laid down was that the damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principle of the common law. The present is a simple case of a shipowner claiming damages against a single tortfeasor for damage done to his vessel by the negligence of the tortfeasor's servants. Whatever damages are recoverable in such an action, and whatever circumstances can be taken into consideration in arriving at the damages to be awarded, they are the same damages and the same circumstances as it would be permissible to award, or to consider, had the collision taken place on land between vehicles belonging to the same class of owners. In both instances the plaintiff must prove his case, and must within the accepted rules establish the claim for damages which he sets up. The present case is peculiar in this respect, that the plaintiffs are the owners of a non-profit earning vessel. Until comparatively recently the claim of such an owner was not recognized in the Admiralty Court. That such a claim is now admissible is clearly established by the decisions in *The Greta Holme* (4); *The Mediana* (5); and *The Marpessa.* (6) Bargrave Deane J., whose knowledge of Admiralty practice was very extensive, indicates in his judgment in *The Astrakhan* (7) that so far as his experience went that was the first time the rule laid down in those cases had been applied to the case of a warship.

I must refer later to those cases in which the question of the matters which it is legitimate to take into consideration in assessing the damages in such a case are considered. Before

(1) [1902] P. 17.
(2) 13 P. D. 191, 200.
(3) [1922] 2 A. C. 242.
(4) [1897] A. C. 596.
(5) [1900] A. C. 113.
(6) [1907] A. C. 241.
(7) [1910] P. 172.

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doing so I wish to clear out of the way a number of decisions which have been referred to, and which with respect to those who have thought differently, have no real bearing on this case. These decisions divide themselves into two classes. The one class comprises cases where the dispute has been between shipowners and underwriters, the question there depending upon their respective rights and obligations arising out of the contract into which they have entered. The other class comprises cases where the dispute has arisen between shipowner and joint tortfeasors, and where owing to the rule prevailing in Admiralty, the liability of the two tortfeasors inter se has been considered. Instances of the first class are *The Vancouver* (1), and *The Ruabon.* (2) The instance of the second class is *The Haversham Grange.* (3) The Master of the Rolls in the last mentioned case plainly indicates what the task before the Court was when he says: "A sum had to be done to ascertain what the total cost of all the mischief was, and to apportion between the two delinquents the particular part of the cost attributable to the wrong caused by each of them." No such question arises in the present case, and the grounds of the decision are not in my opinion applicable to this case. The same observation applies to the insurance cases. In *The Vancouver* (1) in the House of Lords, Lord Blackburn says: "I agree with the Master of the Rolls that the first question is, what would be the measure of the average on the hull which the underwriters would have had to pay if there had been no warranty free of average on the policy." No similar question can arise in this case.

There are two cases which require special consideration, *The Acanthus* (4) and *The Astrakhan.* (5) In both of these the dispute was as here between shipowners and single tortfeasor. In *The Acanthus* (4) the facts were that in order to repair the damage sustained in a collision for which the defendants were liable, the plaintiffs' vessel was dry docked, and the plaintiffs (without causing delay or increase of dock

(1) 11 App. Cas. 573, 591.
(2) [1900] A. C. 6.
(3) [1905] P. 307, 313.
(4) [1902] P. 17.
(5) [1910] P. 172.

expenses) took advantage of the opportunity to fit her with bilge keels. The report of the registrar contained this finding: "On the whole, however, we came to the conclusion that the plaintiffs had not, before the collision, been absolutely committed to doing the bilge-keel work at that time, and that justice would be done by apportioning the expenses consequent on dry docking the vessel, as well as the loss sustained through her detention between the bilge-keel work and the collision repairs." All that need have been said about this portion of the report was that the registrar appeared to have applied a principle to the assessment of the damages which was unknown to the common law, and which a Court of Equity would not recognize. This is in substance what the President said, and he only applied the principle laid down in *The Ruabon* (1) to the extent of accepting and acting upon Lord Halsbury's statement of the law, where he says: "But it seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or statute. The Courts no doubt will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." Had the facts in *The Acanthus* (2) justified the conclusion that the work done by the owner was necessary work, I venture to think that the President would not have referred to any question of contribution by the owner, but would have considered the question of whether the owner had in fact suffered any and if so what loss by the detention of his vessel during the time necessary to carry out those repairs. This is what was done by Bargrave Deane J. in *The Astrakhan*. (3) In that case the learned judge took the view that the time occupied by doing necessary owners' repairs should be excluded altogether from consideration in arriving at the damages

(1) [1900] A. C. 6, 9.
(2) [1902] P. 17.
(3) [1910] P. 172.

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payable by the tortfeasor, upon the ground that there was under the circumstances no evidence of any loss to the owner by reason of the detention of the vessel for the period necessary to carry out those repairs. For detention beyond that period the learned judge held that damages were recoverable.

In my opinion the question in every simple case of a claim by shipowner against tortfeasor where liability for damage to the owner's vessel is either established or admitted must be: Has the owner proved that he has suffered any loss, and if so, how much? If the fact be that the whole of the time during which the vessel was detained was occupied by the repairs necessary to make good the collision damage, and by necessary owners' repairs, the work on both proceeding simultaneously and continuously, and occupying the whole time, the owner in my opinion would fail to establish a case for anything beyond nominal damages. In such a case as that, on his own showing the vessel was not detained for a moment longer than was necessary to carry out urgently needed repairs, quite apart from the collision damage. If the question arises, as it does in the present case, whether the repairs carried out by the owner apart from the collision damage, though necessary, would not but for the collision have been done quite so soon as they were in fact done, the matter is not so simple. In every case it must be a matter of degree, and the tribunal whose duty it is to assess the damages must exercise its own common sense. There is no rule of law that because the owners' repairs were executed sooner than but for the collision they would have been executed, the time occupied by those repairs must be allowed in the time for which demurrage is awarded. There is further no rule of law which prescribes the amount of the damages to which the owners of a warship or a non-profit earning vessel are entitled in the event of detention to make good collision damage. The judgments in *The Marpessa* (1) in all three Courts, and the view expressed by Lord Herschell in *The Greta Holme* (2), are merely indications of principles which may be applied in cases where the facts warrant it.

(1) [1906] P. 14, 95; [1907] A. C. 241. (2) [1897] A. C. 596, 605.

The broader and the truer view of the principle of general application is supplied by a statement of Lord Halsbury in *The Mediana* (1), where he is drawing the distinction between a claim for special and for general damages, he says: "But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damages at all—'We will give the plaintiff a trifling amount'—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious."

This case must go back to the registrar. I do not want to say anything which will make a difficult task more difficult. This I think I must say—namely, that in a case like the present there undoubtedly is a rule of law that the fact that a vessel is a non-profit earning vessel is no reason why damage should not be awarded to the owner as against a tortfeasor. In a case where a real loss is established principles have been indicated by the application of which it is legitimate to assess the money value of that loss. On the other hand there is no rule of law requiring the registrar to adopt any particular principle, or to award any particular sum in a case where in his opinion no substantial loss has been suffered. The judgments in *The Kingsway* (2), both in the Court below and in this Court, proceed in my opinion on this view of the law. The question of quantum in the present case is entirely for the registrar. He has actual facts before him on which to proceed. He has not to consider what may happen, but to deal with what did happen. If in his opinion the Admiralty as representing the owners of a special class of non-profit earning vessel have under the particular circumstances of this case suffered no substantial loss, he is quite entitled to say so, and to award them what Lord Halsbury describes as a trifling amount. The appellants have, in my opinion, established the fact that the registrar did adopt a wrong

(1) [1900] A. C. 113, 118. (2) [1918] P. 344.

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principle in assessing the damages. The appeal, therefore, must be allowed with costs here and below, and the case remitted to the registrar for reconsideration.

ATKIN L.J. In this case the *Chekiang* collided with H.M.S. *Cairo*, a light cruiser, at Hankow, and damaged the stem and adjoining plates of the *Cairo* above the water line. The damage was repaired at Hong Kong, took twenty days to complete and cost 675*l.* The plaintiffs have been awarded 675*l.* for cost of repairs, and 5800*l.* for damages for detention, made up of 2000*l.* for loss of use, and 3800*l.*, pay and allowances of officers and men. The defendants object that the damages for detention are excessive, and have been assessed upon a wrong principle.

After the naval authorities had determined to repair the collision damage, and after the *Cairo* had arrived at Hong Kong for that purpose, it was decided that her annual refit should take place at the same time. It did take place, and took eight weeks to complete, proceeding concurrently with the repair of the collision damage, which, as I have said, took twenty days. During the whole of the eight weeks the officers and crew remained on board the *Cairo*, some of them being employed in parties in some of the operations of refitting. The claim for loss of use is a claim of 100*l.* per day, arrived at roughly by taking 5 per cent. on the estimated capital value of the vessel at the time. The deputy Accounts Officer in the Department of the Accountant-General of the Navy was asked: "That has been the principle adopted in other cases, and is in accordance with the practice of this Tribunal? (A.) Yes." This sum has been accepted without any further demur by the registrar and approved by the President. It seems to me clear that it was adopted as being correct both in principle and in accordance with practice. The claim for officers' and men's pay and allowances as made is at the rate of 207*l.* per day, and there seems to be no dispute as to this figure. Twenty days at 207*l.* per day would amount to 4140*l.* The learned registrar has allowed 3800*l.*; so that he has allowed the equivalent of the pay and allowances for the whole

period of twenty days less one and three-quarter days, or in other words has allowed the defendants a deduction of something over 8 per cent. on the whole amount for the period.

It appears to me that this result has been arrived at on a wrong principle; by applying a fixed rule and ignoring considerations which must be relevant to the real inquiry, what is the actual damage suffered by the plaintiffs. "The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less." This statement of the law by Bowen L.J. in *The Argentino* (1) has been adopted in the House of Lords, and undoubtedly states the law binding upon the Admiralty Division and ourselves. The application of the principle is succinctly stated by Lord Loreburn L.C. in *The Marpessa.* (2) "Now until the case of *The Greta Holme* (3) the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such a case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases." The only question, therefore, in each case is what was the actual loss to the plaintiffs arising from the deprivation of the use of their chattel. It is difficult enough to estimate the damages in this respect where the plaintiffs are the Admiralty suing in respect of the loss of the use of one of His Majesty's ships. In the case of vessels required for continuous use, but not for commercial purposes, it has been stated on eminent authority that the value of the services lost might be measured by the annual cost of the services year in and

(1) 13 P. D. 191, 200. (2) [1907] A. C. 241, 244.
(3) [1897] A. C. 596.

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year out, including therein cost of maintenance, interest on capital, and depreciation: see per Lord Loreburn in *The Marpessa*. (1) I am not clear that this is intended to be laid down as a general rule; it seems to offend against the statement already made by the Lord Chancellor that no case could lay down a rule of universal application; and it is subject to the criticism directed to such a rule by the President, and the Court of Appeal, in the very case under appeal, where the decision below was affirmed. Nor is it clear that any such rule is applicable to a ship the value of whose use may vary immensely with the circumstances of the moment, in times of war and in times of settled peace, when commissioned and when laid up. But in any case a rule which is applicable when the plaintiffs are altogether deprived of the beneficial use cannot be applicable when they retain part or the whole of the beneficial use; nor does it appear right that the rule applicable to plaintiffs, who but for the collision would in fact have put the vessel to beneficial use, should be applied to plaintiffs as to whom it can be proved that during the period of repair they would not have put the vessel to beneficial use. And I think it also follows that if it can be shown that the period of collision damage enabled the owners to execute other repairs, the completion of which otherwise would with reasonable certainty have deprived the owners of some period of beneficial use, the time so saved, with all proper discounts for uncertainty, etc., may properly be taken into account. In this case it is plain that the plaintiffs did not lose the whole beneficial use of the ship, during the twenty days in question. They occupied her with her officers and crew during the whole period; and during the same period were engaged in carrying out her usual annual refit.

In estimating the actual loss to the owners, it seems to me that the above facts must be taken into account as tending to diminish the amount of damages which might be given if there was no such use. Whether the assessing tribunal should award any and what sum after taking into account all relevant factors, is a question for them. It is plain that

(1) [1907] A. C. 241, 244.

in awarding the same sum as though there had been complete loss of use, a wrong principle has been adopted. The same considerations apply to the pay and allowances. The officers and crew were in fact engaged upon the ship presumably on some, at any rate, of their usual duties; some of them were during the period of collision repair engaged in parties upon the refit. Moreover they would be engaged in precisely the same way, apart from the collision, at the time when the vessel did undergo her annual refit in accordance with the prospective programme. It is for the assessing tribunal to take all these matters into consideration, and estimate what actual loss if any the plaintiffs sustained by the officers and crew being engaged on the ship in dry dock in the circumstances, and not as they would have been had there been no collision.

In my opinion there is no direct authority on this particular matter, i.e., where some use has been made by the owners of a non-commercial vessel during the period of collision repair, except *The Acanthus* (1) and *The Astrakhan* (2), in neither of which does this point seem to have been expressly argued. In *The Acanthus* (1) Sir Francis Jeune dealt in terms with dock expenses, which appear to me to raise a different question; and treated the damages for detention as following the division of the dock expenses. In *The Astrakhan* (2) Bargrave Deane J., for purposes of damages for detention, deducted from the period of collision damage the time estimated for refitting repairs. I think that the latter view was correct. Dock expenses appear to me to raise quite a different question. They are treated as part of the expenses of actual repair; and if they have been incurred primarily for repairing collision damage they form part of such collision damage. I do not see how it can be suggested that they cease to be part of the cost of repairs merely because the owner takes advantage of the occasion to use the ship for purposes of his own; or to use the dock for executing other repairs for which he would not have engaged the dock but for the collision repairs. If he engages the dock not only for repairing the damage of one

(1) [1902] P. 17. (2) [1910] P. 172.

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collision but also for repairing at the same time the damage of a second collision, it is right that the expenses should be divided between the two wrongdoers in estimating the damage to which each is liable; and so also if he engages the dock for the purpose of repairing not only the collision damage but also damage which at that time it is necessary for him on his own account to make good. In each case the question seems to be one of fact whether the dock expenses are part of the expenses of repairing the damage in respect of which the party sought to be charged is liable. *The Ruabon* (1), so far as the claim was based on a right to contribution, is not relevant; so far as it decides that the underwriters must bear the dock charges as part of the cost of repair, it is in accordance with the view expressed above.

I may say with great respect that some of the dicta of Lord Halsbury in *The Mediana* (2) as to damages for detention of a chattel are a little difficult to reconcile with accepted views as to the measure of damages in such cases. One would think that the amount of the owner's loss in being deprived of his horse or his chair must depend upon the actual use which might be expected to be made of the horse or chair during the period of detention. If either would be in constant use there might be one amount of damages; but if it could be shown that neither would be used at all during the period of detention the damages would necessarily be less, though they need not be contemptuous. Small damages for detention of chattels in such circumstances are quite usual in actions of detinue.

For the reasons above given I think that this appeal should be allowed with costs here and below; and the report as to items 2 and 3 thereof be rejected and not confirmed, and the claim as to such items be remitted to the registrar and merchants.

LAWRENCE J. I concur. *Appeal allowed.*

Solicitors for the appellants: *Waltons & Co.*

Solicitor for the respondents: *The Treasury Solicitor.*

(1) [1900] A. C. 6. (2) [1900] A. C. 113.

E. C. M. T.

DIVORCE.

NEPEAN (OTHERWISE LEE WARNER) *v.* NEPEAN.

1925
March 3.

Nullity—Impotence—Marriage Settlements—Petition for Variation—Property settled—Covenants by Third Parties—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

The power given to the Court by s. 5 of the Matrimonial Causes Act, 1859, and extended by s. 3 of the Matrimonial Causes Act, 1878, to inquire into and vary settlements, extends to cases where nullity of marriage has been decreed for impotence. "Property settled" includes money covenanted to be paid by third parties. For the purpose of such alteration the annulled marriage must be treated as if it were valid.

IN this case the parties were married on December 24, 1915. On April 18, 1916, a post-nuptial settlement was executed between the husband of the first part, the wife of the second part, her father and mother of the third and fourth parts, and trustees of the fifth part. After reciting that pursuant to an agreement made before the marriage the husband had effected an assurance on his life for 3000*l.* at the annual premium of 75*l.*; and that the wife was entitled under an appointment made by her parents to one-third share of certain funds comprised in their marriage settlement, subject to the life interests of her parents; the wife's interest in the said trust fund was assigned to the trustees upon trust in the first place to pay the premiums on the said policy of assurance during the life of the husband, and subject thereto upon the usual trusts for the wife for her separate use during her life and then for the children of the marriage, if any; and if none as the wife should by deed or will appoint. The husband assigned the policy above mentioned to the trustees upon the same trusts as were declared of the property settled by the wife, but with an ultimate trust in favour of the husband if he should survive his wife and there should be no children of the marriage. The husband covenanted to pay the premiums on the said policy.

The wife's father covenanted to pay to the trustees 150*l.* a year during his life so long as the husband or the wife or any

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issue of the marriage should be living, to be held upon the trusts of the wife's fortune; and the wife's mother covenanted to continue this payment upon the same conditions during her life if she survived her husband.

By a decree made absolute on the wife's petition on November 29, 1923, the marriage was declared null and void on the ground of the husband's incapacity.

The wife now petitioned for a variation of this post-nuptial settlement.

The registrar reported that the husband should covenant to pay the wife during her life a sum equivalent to 225*l.* a year free of income tax, that all interest taken by the husband under the settlement, except under the policy of assurance, and the provision for payment of premiums out of the wife's fund, should be deleted, but on his covenanting to pay the premiums on the policy during his life, the covenants of the wife's parents should continue, but as to 75*l.* only instead of 150*l.*

The wife applied for confirmation of the registrar's report with certain agreed verbal alterations.

T. Bucknill (*H. Farrar* with him) for the wife. The wife's parents were parties to the settlement, and by their covenant have created settled property with which the Court has power to deal under the Acts: *Dormer* v. *Ward* (1); *In re Wombwell's Settlement.* (2) The principle is the same, though the covenant in the first case was the husband's.

Noel Middleton for Mr. and Mrs. Lee Warner. The powers of the Court under s. 5 of the Act of 1859 are to be exercised in favour of the children of the marriage or their respective parents. In this case there are no children and never can be any and there is no marriage. The petitioner is getting maintenance from her husband; why should her parents be ordered to pay money for her when the reason for such payment has disappeared? It is admitted that the parents' covenant could not be enforced at law. Why should this Court enforce it? *Dormer* v. *Ward* (1) was a different case,

(1) [1901] P. 20. (2) [1922] 2 Ch. 298.

because the covenant was by the husband. It does not apply to covenants by third parties.

J. M. Rivington for the husband took no part in the argument.

HORRIDGE J. The question raised here is whether the registrar is right in his recommendations with regard to a post-nuptial settlement made in consideration of a marriage subsequently declared to have been null and void by reason of the respondent husband's impotency.

The petitioner brought into settlement a reversionary interest in a trust fund appointed to her by her parents on her marriage, and I have no power to deal with the appointment. The respondent's interest in that fund is to be deleted, and he does not complain.

The question I have to decide arises with regard to a covenant by the father and mother of the petitioner to pay her 150*l.* a year during the life of the survivor of them, as to which the learned registrar recommends that their liability should be maintained to the extent of 75*l.* a year. It is contended on their behalf that the marriage, in consideration of which they so covenanted, having been declared null and void, the consideration for their covenant has wholly failed, and they should be relieved of any further liability.

I think there is a good deal to be said for the view of Gorell Barnes J. in *Dormer* v. *Ward* (1); but the Court of Appeal in that case held that since s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, extends the power of the Court to deal with settled property to cases of nullity of marriage, in which there are not and could not be children, the marriage which has been annulled must in this respect be treated as though it had been valid.

Thus Vaughan Williams L.J. said (2): "Now, generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the Court power to vary the settlement by

(1) [1900] P. 130. (2) [1901] P. 32.

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treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the application of the property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the Court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided." And again (1): "Now, in my judgment, the whole of this clause, and indeed the whole settlement, is according to its terms conditional upon a valid marriage taking place, and, although it is true that until the declaration of nullity this marriage was voidable only and not void, and that, therefore, that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under s. 5, and I do not agree with the argument approved by Gorell Barnes J., that the covenant was either still in force or at an end, and that the petitioner must accept one of these alternatives, and, therefore, could only ask the Court to enforce a legal right which has nothing to do with an application under s. 5. I think that there was a third course open to the petitioner, who, I think, had no legal right which she could enforce; for, in my opinion, the declaration of nullity would be a complete answer to an action on the covenant. It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the Court under s. 5 to make an order for the application of this 200*l.* for her benefit."

Mr. Middleton contends that the cases are not on all fours, as there the covenantor was the husband, but I cannot see that this makes any difference. The point is that on an

(1) [1901] P. 33.

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application under s. 5 the Court can treat as a marriage that which is in law no marriage at all, being a voidable marriage which has been avoided, though in the absence of an order under s. 5, the failure of consideration might have been a good defence to an action on the covenant. The registrar proposes that the liability of the covenantors should be maintained to the extent of 75*l.* only, and I accept this recommendation. The registrar's report will therefore be confirmed subject to the agreed alterations. The petitioner's costs will be paid by the respondent, and Mr. and Mrs. Lee Warner must bear their own costs.

Solicitors for petitioner: *Crawley, Arnold & Co.*
Solicitors for Mr. and Mrs. Lee Warner: *Dawson & Co.*
Solicitors for respondent: *Baker & Savigny.*

J. R. B.

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March 31; *April* 8.

HOLLAND *v.* HOLLAND.

Adultery—Adulterer unknown—Husband's Evidence of Non-access—Bastardization—Admissibility.

The rule laid down by the House of Lords in *Russell* v. *Russell* [1924] A. C. 687, that evidence of non-access by the husband or wife cannot be admitted where the result may be to bastardize a child, does not include a still-born child.

IN this case the parties were married on November 16, 1907. There was one child of the marriage, a boy born on January 29, 1909. On December 8, 1919, the parties executed a deed of separation, the husband agreeing to pay the wife 12*l.* a month for the support of herself and the child. Two years after the date of the separation deed the husband took over the custody of the child, and his payments to the wife were reduced to 10*l.* a month. From this date to that of the husband's petition the parties lived entirely apart. On January 1, 1924, the wife gave birth to a still-born child. The husband on July 1, 1924, presented this petition for a

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divorce on the ground of his wife's adultery, proved by the birth of the still-born child. There was no evidence except that of the husband to show that he could not have been the father of that child, both he and his wife having been resident in England during the whole of the year preceding the birth. The husband had obtained on summons leave to proceed without naming a co-respondent.

T. Bucknill for the petitioner. In *Russell* v. *Russell* (1) the House of Lords decided that no evidence of husband or wife as to their intercourse was admissible which had, or might have, the result of bastardizing a child born of the wife after marriage; and that the practice which had grown up in the Divorce Court of admitting such evidence, on the ground that the rule only applied in cases where legitimacy was directly in issue or that the evidence was admissible under s. 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), is erroneous and cannot be supported. But the judgments in that case clearly show that the whole ground of the decision depends on the bastardizing of the child. If there is no child to be bastardized the rule laid down by the House of Lords does not apply. Horridge J. in *Fosdike* v. *Fosdike and Hillier* (2) has already allowed the husband's evidence to be admitted in the case of a miscarriage; but the case is reported only in the Times Newspaper and in the Law Times Newspaper, probably because the case was undefended, and the judge gave no reasons for his decision.

The respondent did not appear.

Cur. adv. vult.

April 8. SWIFT J. This was a husband's petition for divorce on the ground of the adultery of his wife.

Evidence was given to the effect, and I find as a fact, that on January 1, 1924, Esther Annie Holland, the petitioner's wife, was confined of a still-born child. I also find that the child was a full-time child, and had probably been dead for about three weeks before the respondent was delivered of it.

(1) [1924] A. C. 687.
(2) Times Newspaper, January 22, 1925; L. T. Newspaper, vol. 159, p. 95.

It follows, therefore, as an almost irresistible inference, and I find as a fact, that some time in March or April of 1923 the respondent had sexual connection with some male person. There was no evidence before me as to who that person was except the evidence of the petitioner, which was quite clear and positive that he was not responsible for the condition of pregnancy in the respondent which resulted in her confinement on January 1, 1924. He deposed to the facts that he and the respondent separated in the year 1919, that on December 8, 1919, a deed of separation was entered into between them; that thereafter he saw her once or twice, but not to speak to; that he last saw her in the street about the middle of 1922, and that he did not see her and did not have any sexual intercourse with her in the year 1923. This evidence, if admissible and if believed, establishes clearly that the petitioner is not the person who had sexual connection with the respondent in March or April, 1923, and it, therefore, follows that she in the early part of 1923 committed adultery with some man unknown as alleged in para. 3 of the petition.

The difficulty in deciding this case arises from the necessity of determining whether the evidence of the petitioner, which is the only available evidence of the adultery of the respondent, is admissible, or whether it should be rejected as coming within the principle of the decisions that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock. This was an undefended case, but Mr. Bucknill, who appeared for the petitioner, very properly called my attention to this difficulty, and contended that, inasmuch as in this case there was no child which could be bastardized by the evidence of the petitioner, the rule had no application and the evidence was admissible. As there was no counsel to argue otherwise, or to assent, I thought it right to reserve my judgment and look into the authorities for myself.

I am satisfied that the decision of Lord Mansfield in *Goodright* v. *Moss* (1) (held by the House of Lords in *Russell* v. *Russell* (2) to be equally applicable to evidence given in

(1) (1777) 2 Cowp. 591.

(2) [1924] A. C. 687.

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proof of adultery for the purpose of obtaining a divorce as for any other purpose) to the effect that evidence of non-access may not be tendered by a spouse and received by a Court with the object or possible result of bastardising a child of the marriage, applies only where the effect of the evidence, either directly or indirectly, is to bastardise a child born during wedlock. The law excludes only the evidence of a mother of a child and her husband. It does not exclude the evidence of other persons, although the effect of that evidence may be directly to bastardize a child born in wedlock, and it does not exclude the evidence of the spouses themselves unless the result of that evidence is to bastardize a child born in wedlock. For example, evidence of non-access may be given by a husband to prove that he is not responsible for a contagious disease from which his wife is found to be suffering, and evidence of husband and wife may properly be admitted in nullity suits and in cases where cruelty is alleged. As Viscount Finlay said in *Russell* v. *Russell* (1), "It is immaterial with what object such evidence is given, but, unless there is a child, and the evidence is to show that that child is not the child of the husband, the rule never comes into play at all." In the recent case of *Fosdike* v. *Fosdike and Hillier* (2) Horridge J. admitted evidence by a petitioner of non-access where no child was born, but where the respondent had a miscarriage after some four months' pregnancy.

The question I have to decide, therefore, is: Was there in this case a child which might be bastardized by the petitioner's evidence of non-access to his wife? If there were, his evidence was not admissible. If there were not, his evidence is admissible. I am of opinion that there was no such child. On January 1, 1924, the respondent was delivered of the form or body of a child, but that form or body never was a child. It never lived—it never breathed—it never had a separate existence—it never was a reasonable creature in being and under the King's Peace—it never had any civil rights—it could never pass rights to others—it could not be the subject

(1) [1924] A. C. 718.

(2) Times Newspaper, January 22, 1925; L. T. Newspaper, vol. 159, p. 95.

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of an order under the Bastardy Acts : *Rex* v. *De Brouquens* (1), and for all the purposes of the law it was as though it had never been produced.

I am, therefore, of opinion that the petitioner's evidence does not in this case bastardize either directly or indirectly any child born in wedlock, and that, therefore, the rule in *Goodright* v. *Moss* (2) is not applicable to that evidence, but that it is admissible.

The evidence being admissible, I believe it and am satisfied that the adultery of the respondent is proved, and I grant the petitioner the decree nisi for which he asks, and the custody of the child of the marriage, who is sixteen.

Solicitors : *J. D. Langton & Passmore, for Bickley & Lynex, Birmingham.*

J. R. B.

DIVORCE.

1925
May 4.

SEAGER *v.* SEAGER.

Divorce—Jurisdiction—Domicil—Exception to Rule of Domicil as Test of Jurisdiction—Petitioner domiciled in Turkey—Treaty of Peace (Turkey) Act, 1924 (14 *Geo.* 5, *c.* 7), *s.* 1, *sub-ss.* 1, 2—*Treaty of Peace (Turkey) Order*, 1924; *Statutory Rules and Orders*, 1924, *No.* 820.

The petitioner, the wife of a British subject domiciled in Turkey, had obtained in His Britannic Majesty's Supreme Court for the dominions of the Sublime Porte (Matrimonial Jurisdiction) a decree nisi for a divorce on the ground of her husband's adultery. In consequence of the ratification of the Treaty of Lausanne this Court ceased to exist before the decree was made absolute :—

Held, that by virtue of the combined effect of the Treaty of Peace (Turkey) Act, 1924, art. 16 of the Convention between Turkey and Great Britain of the same date as the Treaty, art. 2 of the Statutory Rules and Orders under Peace Treaties, the Treaty of Peace (Turkey) Order, 1924, this Court had jurisdiction to make the decree absolute in spite of the Turkish domicil of the parties.

MOTION by the wife of a British subject domiciled in Turkey to make absolute a decree nisi for the dissolution of her

(1) (1811) 14 East, 277. (2) (1777) 2 Cowp. 591.

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marriage obtained by her on July 16, 1924, from His Britannic Majesty's Supreme Court for the dominions of the Sublime Ottoman Porte (Matrimonial Jurisdiction). That Court had found that the respondent husband was a British subject domiciled in Turkey and that he had committed adultery at various dates since July 18, 1923 (the date of the commencement of the English Statute Matrimonial Causes Act, 1923 (13 & 14 Geo. 5, c. 19)). The parties had been married at the British Consulate-General at Constantinople on October 31, 1893, and there were three children of the marriage, all over twenty-one.

On August 6, 1924, the above-mentioned Court ceased to exist in consequence of the ratification of the Treaty of Lausanne with Turkey.

By art. 16 of the Convention (respecting inter alia jurisdiction) on July 24, 1923 (being the same date as the Treaty of Peace with Turkey), it was agreed that in matters of personal status (i.e., all questions relating inter alia to divorce) as regards non-Moslem nationals of Great Britain in Turkey, the national tribunals or other national authorities established in the country of which the party whose personal status is in question was a national should alone have jurisdiction.

By the Treaty of Peace (Turkey) Act, 1924, it was provided that His Majesty might make such Orders in Council as were necessary for conferring on Courts within His Majesty's Dominions jurisdiction in cases where, under the said Convention (respecting inter alia jurisdiction), such Courts were alone to have jurisdiction.

By art. 2 of Statutory Rules and Orders No. 820, the Treaty of Peace (Turkey) Order, it was provided that in all cases where, in pursuance of the said Convention, Courts established in British territory were to have jurisdiction, His Majesty's Supreme Court of Judicature in England should be the Court having such jurisdiction (unless it were made to appear on application to the Supreme Court of Cyprus that that Court could more conveniently try the case); and it was further provided that the law to be administered in His Majesty's Supreme Court of Judicature in England should be the law

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which would have been applicable to the case under art. 90 of the Statutory Rules and Orders, 1910, No. 1184.

No application had been made to the Supreme Court of Cyprus and neither party desired to make one.

The wife's petition set out the above Rules and Orders, and she now moved to have the decree nisi made absolute.

T. Bucknill for the motion.

Hon. V. Russell for the King's Proctor.

SWIFT J. directed the case to be listed for decree absolute on the first motion day. The facts to be recited in the decree.

Solicitors: *R. E. F. Lander; The King's Proctor.*

J. R. B.

Distinguished. PERRING *v.* PERRING. [1949] 2 All E.R. 334.

DIVORCE.

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May 28; *June* 23.

WARREN *v.* WARREN.

Divorce—Adultery—Confession by Wife of Adultery—Admissibility—Bastardization of Child.

A wife's admission that she had committed adultery, even if accompanied by a statement of her belief that a child, subsequently born, was the result of the adultery, cannot bastardize the child without evidence of the non-access of the husband.

The confession of the wife, therefore, that she has committed adultery is admissible as evidence in a suit for divorce so long as she does not assert that the husband could have had no access at the time of conception.

Russell v. *Russell* [1924] A. C. 687 distinguished.

THE parties were married in May, 1913; there was one child, born in January, 1916. In the autumn of 1916 the husband had complained to his wife of her conduct with certain soldiers, and she confessed that she had committed adultery; her husband forgave her and the parties lived happily together at Marks Tey in Essex until June, 1922. In that month the wife went to stay with her mother at Halesworth in Suffolk until the middle of July. After her

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return she confessed to her husband that she had committed adultery during her absence and was pregnant in consequence.

In February, 1923, the wife went away from her husband's house and stayed with an uncle at whose house the child was born on April 5, 1923. The wife registered the birth of this child without naming a father.

On January 15, 1924, the husband filed a petition for a divorce on the ground of his wife's adultery. The only evidence of the adultery was the wife's confession, verbal and in certain letters, always coupled with the assertion that the adultery resulted in the birth of the child.

There was no evidence of non-access, or non-possibility of access, of the husband during the period within which the child must have been conceived.

The case came on for hearing under the Poor Persons Rules on May 28, 1925.

J. P. Gorman for the petitioner tendered the letters of the wife and evidence of her verbal confessions as sole evidence of her adultery.

[SWIFT J. How can I admit this evidence in face of the decision in *Russell* v. *Russell*? (1)]

All that *Russell* v. *Russell* (1) decides is that neither the father nor the mother can give evidence which would bastardize the child. This evidence could not bastardize the child, because unless you can prove non-access of the husband you cannot hope to bastardize a child. The wife's confession of adultery is good evidence against her, but what she says about the pregnancy is a mere uncertain inference. In the absence of evidence to show that there was no access by the husband this inference would not bastardize the child; it would not even be admissible in a case against a seducer for maintenance at quarter sessions. *Robinson* v. *Robinson and Lane* (2) shows that the Court can make a decree for divorce on the wife's confession.

Cur. adv. vult.

(1) [1924] A. C. 687. (2) (1859) 1 Sw. & Tr. 362.

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June 23. SWIFT J. In this case, which came before me on May 28, the husband petitions for divorce on the ground of his wife's adultery. The wife does not defend the suit. The parties were married on May 12, 1913. They lived together at various addresses, and in January, 1916, a child was born. In the autumn of 1916 rumours reached the husband of his wife's alleged infidelity. He taxed her with it, and she confessed to adultery with soldiers. For that he forgave her and condoned her offence, and they continued to live together as husband and wife and resided in the same house until February, 1923. I cannot and do not admit any evidence as to the terms upon which they lived up to that date. During this period—namely, in June, 1922, the respondent went to stay with her mother for about a month and returned about the middle of July. Shortly after her return she made statements to her husband that she had committed adultery with some man and that she was pregnant. These statements were made both verbally and in writing, and it was quite clear that she was at once declaring that she had committed adultery and that her then state of pregnancy was the consequence of such adultery. It was proved that a similar statement was made by her to a relative. If evidence as to the wife's confessions, verbal and written, is admissible and is believed it is quite clear that the respondent committed adultery in the month of June or July, 1922. In February, 1923, she left her husband's house, and in April, 1923, she gave birth to a living child. In the ordinary course of nature that child must have been begotten after June 25.

I believe the respondent's verbal statements to have in fact been made to her husband and to Mr. Charles Warren, and looking at her letters and general conduct I am satisfied that her statements are true, and I find that she did at some time between June 1 and July 31, 1922, have sexual intercourse with some man other than her husband.

Then arises the real difficulty in the case. Is proof of the statements of the respondent admissible in evidence?

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If it is the petitioner is entitled to his decree; if it is not, the petition must be dismissed.

The Court regards with suspicion evidence of a petitioner or respondent if uncorroborated, and examines closely evidence of a confession or admission of adultery; it will only act upon such evidence if satisfied beyond doubt that such confession was in fact made and that it is genuine; but I think it is clear that evidence of the wife's statements is admissible and that the Court may act upon those proved statements, although uncorroborated, if it is satisfied of their truth: see hereon *Curtis* v. *Curtis* (1); *Robinson* v. *Robinson and Lane* (2); *Williams* v. *Williams and Padfield.* (3) But this is subject to the exception laid down in *Goodright* v. *Moss* (4) in an action of ejectment, and stated by the House of Lords in *Russell* v. *Russell* (5) to be equally applicable to issues of proof of adultery that "neither spouse may give any evidence to prove non-intercourse or non-access of the husband which may possibly have the effect of bastardizing the child of a married woman."

Upon the authority of these cases I suggested to Mr. Gorman, who very kindly conducted the case for the petitioner, who sued as a poor person, that he was precluded from giving any evidence of statements by the wife which might have the effect of bastardizing her child. He replied in effect that the rule in *Goodright* v. *Moss* (4) did not go so far, and that all that was held in that case or in any case upon which it proceeded, or in any case which had followed it, was that neither spouse could prove non-intercourse or non-access by the husband which might bastardize the child; but that there was nothing in any of the cases which decided that a statement by a married woman that she had had sexual intercourse with a stranger at a time when her husband had access to her, and was presumably the father of the child, was inadmissible.

I have considered the authorities and I am of opinion that

(1) (1905) 21 Times L. R. 676.
(2) 1 Sw. & Tr. 362.
(3) (1865) L. R. 1 P. & M. 29.
(4) (1777) 2 Cowp. 591.
(5) [1924] A. C. 687.

Mr. Gorman's contention is right. Our law presumes that a child born in wedlock is the child of the husband of its mother.

The President (Sir Francis Jeune) in *Gordon* v. *Gordon* (1) said: "The law says that what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognised in the opinion of the judges who were called in to assist the House of Lords in the *Banbury Peerage Case.* (2) In *Cope* v. *Cope* (3) Alderson B., in summing up, said: 'If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shewn that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father.'"

In *Russell* v. *Russell* (4) Lord Finlay said: "There is a strong presumption that the child of a married woman was begotten by her husband. This, however, is not a presumption juris et de jure; it may be rebutted by evidence. The fact that the wife had immoral relations with other men is not of itself sufficient to displace the presumption of legitimacy; non-access by the husband at the time when the child must have been begotten must (unless there be incapacity) further be proved. Proof of non-access cannot be given for this purpose either by the husband or by the wife; neither of them can be asked any question tending to prove such non-access; it must be established entirely by the evidence of other witnesses."

The only evidence by which the presumption that a child born in wedlock is legitimate can be rebutted is by proof that at the time of conception the husband had no sexual intercourse with his wife. This may be proved by

(1) [1903] P. 141, 142.
(2) (1811) 1 S. & S. 153, 159.
(3) (1833) 1 Moo. & Rob. 269, 276.
(4) [1924] A. C. 687, 705.

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independent evidence showing that they were physically apart at the moment when conception must have taken place; it may be proved by other means; but it is clear that it cannot be proved by the evidence either of the husband or the wife proving either non-access or non-intercourse. But when that has been said, it seems to me that all *Goodright* v. *Moss* (1) and *Russell* v. *Russell* (2) lay down has been said.

A statement by a husband that he has not been near his wife and has not had sexual intercourse with her is inadmissible; a statement by a wife that her husband has not at the time of her impregnation had access to or intercourse with her is equally inadmissible. I find, however, no authority for saying that a statement made or evidence given by a wife to the effect that whilst her husband had access to her, and whilst presumably he was having intercourse with her, she committed adultery, is to be excluded.

Mr. Gorman in his very able argument convinced me that if the access of the husband was not disputed, the wife's possible belief and her allegation that the child was not the child of her husband were quite immaterial. Any woman may, and some do, have sexual intercourse with more than one man in the course of a few hours; and if a woman has within the period during which conception must have taken place had connection with more than one man, she is only guessing, on more or less data, as to which is the father of the child. But the law presumes that if one of those men is her husband, the child is his. Her guess, and any evidence she gives or any statement she makes about it, are immaterial. However many men she has had connection with nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved. Her evidence and proof of her conduct and statements are admissible unless and until it is sought to prove by these means non-access or non-intercourse. Until then the Court will listen to such testimony and may well come to the conclusion that

(1) 2 Cowp. 591. (2) [1924] A. C. 687.

some of it is absolutely true, and that the rest of it is a mere opinion or guess on her part. It does so in this case. I am quite satisfied on the evidence before me that this woman committed adultery.

I do not accept her guess or opinion that the child she gave birth to in April, 1923, was not her husband's; there is no evidence before me of non-access or non-intercourse between June 1 and July 31, and I do not think *Goodright* v. *Moss* (1) or *Russell* v. *Russell* (2) in any way touch this case.

I hold that the evidence of the statements made by the respondent to the petitioner and to Mr. Charles Warren and the confessions in her letters are true in substance and in fact. On that evidence I believe that the respondent committed adultery, and I grant the petitioner a decree nisi.

Solicitors: *Attenboroughs, for Sparling, Son & Benham, Colchester.*

(1) 2 Cowp. 591. (2) [1924] A. C. 687.

J. R. B.

1924
Oct. 22.
1925
May 26;
June 15.

DIVORCE.

LANKESTER *v.* LANKESTER AND COOPER.

Divorce—Connivance—Husband accessory to Wife's Adultery—American Divorce—English Domicil—Petition by Husband for English Divorce on the Ground of Adultery committed by Wife's Marriage after Divorce—Knowledge by Husband of Wife's Intention to marry Co-respondent if Divorce obtained—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 30, 31.

A husband and wife, domiciled in England, being advised, wrongly, that a divorce obtained in the United States would be valid to dissolve their marriage, concurred together in a scheme by which the wife resided in South Dakota long enough to be able to obtain a divorce there, and the husband signed a form of admission provided by a lawyer in the United States, which, he advised, would be sufficient to support the wife's evidence. The wife had told the husband that if she obtained a divorce she should marry A. The Court in South Dakota granted a divorce, and the wife and A. were married. The husband, being advised that the divorce was not valid in England, filed this petition for a divorce on the ground of his wife's adultery with A.:—

Held, that the conduct of the husband amounted to connivance of and being accessory to the adultery within the meaning of ss. 30 and 31 of the Matrimonial Causes Act, 1857.

Held, also, that if the husband's conduct did not amount to connivance or being accessory to, it was clearly conduct conducive to the adultery, and the Court would in its discretion refuse the decree.

THE parties were married in England on April 25, 1914; they were both domiciled in England, and there was no suggestion that they had acquired any other domicil. There were no children, and in March, 1920, the wife suggested a separation. The parties consulted an American lawyer in London, and he advised them to go to Sioux Falls in the State of South Dakota, U.S.A., and stay there for the time required by the Court to enable it to grant a divorce. They went there in June, 1920, and consulted another American lawyer, who advised that the husband should return to England leaving his wife at Sioux Falls. This was done. On November 18, 1920, the American lawyer wrote to the husband advising that the wife should sue for a divorce for statutory desertion, and he enclosed a letter containing a

form of admission for the husband to sign, which, he said, would enable her to succeed. The husband signed and sent the letter. The wife took proceedings in the Court of Sioux Falls, and on July 28, 1921, obtained a decree for divorce in that Court; and on August 1, 1921, she was married to the co-respondent, Cooper. The husband at all times during the planning and obtaining the divorce in South Dakota knew that if his wife obtained a divorce she would marry Cooper.

The husband acquiesced for some time, but being advised that the Dakota divorce was invalid, he filed this petition for a divorce on the ground of his wife's adultery with Cooper.

The petition came on as undefended on October 22, 1924, but the President adjourned the case for argument by the King's Proctor on the question whether the Court had power to grant a divorce having regard to s. 30 of the Matrimonial Causes Act, 1857. (1)

On May 26, 1925, the case came on for argument.

Hawke K.C. and *Roland Burrows* for the King's Proctor. The petitioner's conduct amounted to his being accessory to his wife's adultery in that he had aided in producing, or contributing to produce, that result: see Lord Chelmsford's judgment in *Gipps* v. *Gipps*. (2) His conduct also clearly amounted to connivance, and the relief is clearly barred by the statute. It may be difficult in some cases to distinguish between connivance which is an absolute bar to relief, and conduct conducing to the adultery in case of which the Court has a discretion; but we submit that there is connivance wherever, as in this case, something has been done with the expectation or intention that adultery would follow. The good faith of the petitioner had no bearing on the case if his acts were deliberate.

(1) The Matrimonial Causes Act, 1857, s. 30, provides: "In case the Court . . . . shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage . . . . the Court shall dismiss the said petition."

(2) (1864) 11 H. L. C. 1, 29.

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[They referred to *Palmer* v. *Palmer* (1); *Marris* v. *Marris and Burke* (Queen's Proctor intervening) (2); *Dering* v. *Dering and Blakeley* (Queen's Proctor intervening) (3); *Rogers* v. *Rogers* (4); *Hoar* v. *Hoar*. (5)]

Bayford K.C. and *A. H. Thomas* for the petitioner. There has been no connivance. At most the petitioner's conduct only amounted to conduct conducing to adultery. In *Moorsom* v. *Moorsom* (6) Lord Stowell said: "The presumption of law is against connivance; and if the facts can be accounted for without supposition of intention, the Court will incline to that construction." And in *Hoar* v. *Hoar* (7) he said: "A Court of Justice must look quo animo the step is taken, and, if it be meant well, though it have a fatal consequence, it were hard indeed to fasten on mere imprudence the consequence of guilt. Conduct to bar must be directed by corrupt intention."

[THE PRESIDENT. Yes, but later in his judgment in *Moorsom* v. *Moorsom* (8), Lord Stowell refers to the maxim "Volenti non fit injuria."]

Bayford K.C. Yes, but to what does volenti refer? I submit it must refer to "willing" adultery.

[THE PRESIDENT. Is there any authority to show that a mistake of law is an answer to a charge of connivance?]

Bayford K.C. I cannot find any authority directly on that point, though ignorance of law has been considered in connection with a charge of conduct conducing. It would be straining the law to hold that, if a man, believing a divorce abroad to be valid and good in this country, obtained such a divorce and his wife remarried, he had been guilty of the odious offence of conniving at her adultery.

[THE PRESIDENT. Did not the petitioner intend the consequences of his act, that his wife should remarry and live with the co-respondent as his wife?]

Bayford K.C. He was not unwilling that she should go

(1) (1859) 1 Sw. & Tr. 551.
(2) (1862) 2 Sw. & Tr. 530.
(3) (1868) L. R. 1 P. & M. 531.
(4) (1830) 3 Hagg. Ecc. 57.
(5) (1801) 3 Hagg. Ecc. 137.
(6) (1792) 3 Hagg. Ecc. 87, 107.
(7) 3 Hagg. Ecc. 137, 140.
(8) 3 Hagg. Ecc. 87.

through a valid ceremony of marriage with the co-respondent and become his wife, but he never intended her to commit or consented to her committing adultery.

[Counsel also cited and discussed the cases of *Campbell* v. *Campbell* (1); *Phillips* v. *Phillips* (2); *Parry* v. *Parry* (3); *Millard* v. *Millard and Bastone* (4); and *Noble* v. *Noble and Godman.* (5)]

Cur. adv. vult.

June 15. THE PRESIDENT (LORD MERRIVALE). This is a husband's suit for divorce on the ground that the wife, during marriage, had gone through a ceremony of marriage with the co-respondent in the suit, and since such ceremony has lived with the co-respondent as his wife and committed adultery with him.

At the hearing it appeared that there being a marked disparity in the age of the petitioner and the respondent, she after a period of cohabitation which had extended over some six years, became dissatisfied in respect of certain marital relations, with the result that an agreed course of action was taken between them, which has brought about the present situation of the parties. The wife, it is said, proposed early in 1920 that there should be a separation by consent. In February, 1920, the husband visited, in London, an American lawyer accustomed to practise before the United States Supreme Court, and obtained advice as to the divorce laws in the United States. He became aware that the law and practice in divorce differ in the various States, and was advised upon questions such as jurisdiction by residence and jurisdiction by domicil, and whether an American decree of divorce granted under a jurisdiction founded on residence would dissolve an English marriage.

As a sequel of this interview of February, 1920, the petitioner in June, 1920, went with the respondent to

(1) The Times Newspaper, June 16, 1923.
(2) (1844) 1 Rob. Ecc. 144.
(3) [1896] P. 37.
(4) (1898) 78 L. T. 471.
(5) (1869) L. R. 1 P. & M. 691.

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Sioux Falls in South Dakota with a view to carrying out a plan they had then formed of obtaining a decree of divorce in the Courts of that State. They together consulted a local lawyer, and he was engaged to act in the matter. The petitioner after a while, returned home to England, leaving the respondent in residence at Sioux Falls. In pursuance of their common intention the local lawyer took charge of the execution of their design for obtaining a divorce in South Dakota upon a complaint to be made by the wife of the husband's refusal to her of "reasonable matrimonial intercourse." The wife remained in South Dakota to qualify herself to become in due form a suitor there for divorce resident in the State for twelve months before suit. The lawyer in November, 1920, provided the petitioner with a form of admission upon the case in question, which could be used to corroborate the wife's evidence. The petitioner in February, 1921, signed and forwarded this form of admission. In June, 1921, the wife completed her qualifying period of residence in South Dakota. On July 28, 1921, in conformity with the plan of the parties, a decree of divorce, on the ground I have mentioned, was granted in the State Court to the now respondent. On August 1, 1921, she, being still at Sioux Falls, went through a form of marriage with the co-respondent, and they have since continuously lived and cohabited as husband and wife. At all material times after the respondent went with the petitioner to the United States the petitioner knew that upon obtaining a decree in an American Court she would remarry, and I think he knew she would marry the co-respondent.

At the hearing it appeared to me necessary to consider with some deliberation whether there is power in the Court to decree a divorce to a petitioner in a state of facts such as I have related, and if there is power whether it ought to be exercised, and I adjourned the matter for argument of these questions.

Sects. 30 and 31 of the Matrimonial Causes Act, 1857, so limit the power of the Court in respect of cases where

adultery is alleged as a ground of divorce, that a decree of dissolution of marriage may not be pronounced if the Court shall find that the petitioner has been accessory to or conniving at the adultery in question. Further, the Court is not bound to pronounce a decree if, in its opinion, the petitioner has been guilty of such wilful neglect or misconduct as has conduced to the adultery.

Upon the further hearing of the cause Mr. Hawke, for the King's Proctor, submitted that the effect of s. 31 of the Matrimonial Causes Act, 1857, is to disable the petitioner, in the circumstances, from obtaining a decree.

Mr. Bayford submitted on the petitioner's behalf that at worst his conduct in the matter was conduct conducing to adultery and not connivance of or being accessory to adultery, and that petitioner was entitled to the indulgent consideration of the Court, because he had been advised and believed that if the parties became residents in South Dakota and proof was adduced of good cause according to local law, a decree of divorce granted there would dissolve their marriage. The advice the petitioner got in London from the member of the American bar whom he consulted contained these guarded but somewhat misleading words: "If the proceedings are conducted in good faith, and with no attempt to commit a fraud upon the Court, it is probable that the decree of the American Court would be recognised as valid in England." If the petitioner really entertained a hope or belief that a marriage between people of English domicil can be dissolved by the means taken in this case, I can only suppose he was misled by his wishes. He is an educated man of business, of between fifty and sixty years old, and assuming he did not know the English law on the subject he took no practical or reasonable steps to ascertain it. Indeed he seems rather to have avoided doing so.

Mr. Bayford claimed to define connivance in accordance with the practice of the Ecclesiastical Courts, where a strict construction was undoubtedly used. He claimed also, and rightly as I think, that the presumption of law is against connivance. Further, he contended that the notion of

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connivance involves moral guilt: so that no conduct can be held to amount to connivance where moral guilt is absent: and he argued that, although the cohabitation of the respondent with the co-respondent was in truth adulterous as alleged in the petition, an actual belief of the petitioner that he and the respondent could be lawfully divorced in South Dakota upon the grounds of complaint alleged by the respondent would absolve him of any guilty complicity in this adultery.

Mr. Bayford supported his argument by reference to various cases in the Ecclesiastical Courts, in which it was said that to establish connivance it must be shown that the party accused thereof is particeps criminis.

It is a misleading thing to construe the technical terms of Ecclesiastical Law and of Ecclesiastical Courts as though they were terms of art in the common law. Beyond all question intentional concurrence in the fact of adultery was in the Ecclesiastical Courts a bar to any claim for dissolution of the marriage tie by reason of such adultery. If a petitioner had so concurred he was regarded as particeps criminis; crimen being under the canon law a correct designation of adultery.

The rule of the Ecclesiastical Courts with regard to connivance was of no subtle or artificial kind. Lord Stowell explained its operation in *Moorsom* v. *Moorsom* (1) in a passage which contains this statement: "The rule is volenti non fit injuria; that is the true principle." Sir John Nicholl in *Rogers* v. *Rogers* (2) embodied a simple formula in these words: "To amount to connivance so as to bar the husband there must be circumstances fixing upon him intentional concurrence." Dr. Lushington in *Phillips* v. *Phillips* (3) made this observation: "The party must be acquiescing in and cognisant of the adulterous intercourse." These simple tests of the Ecclesiastical Courts Sir Cresswell Cresswell probably had in mind when as Judge Ordinary he formulated in the cause of *Marris* v. *Marris* (4) under the Matrimonial

(1) 3 Hagg. Ecc. 87, 107.
(2) 3 Hagg. Ecc. 57, 71.
(3) 1 Rob. Ecc. 144, 158.
(4) 2 Sw. & Tr. 530, 543.

Causes Act, 1857, this test: "Did the husband so behave himself as to give a willing consent to the act?"

The question on this part of the case is not whether the petitioner was blameworthy from some conceivable ethical or popular point of view, nor whether in the strict sense of the words in their common law meaning he was party to a crime. It is whether he concurred in the series of acts on his wife's part of which he now complains.

The fallacy of the argument on his behalf appears from the circumstance that he alleges as misconduct of the respondent conduct which so far as he is himself concerned he claims to treat as the innocent sequel of a mistake about law.

Palmer v. *Palmer* (1), a case which was heard before the full Court soon after the passing of the Matrimonial Causes Act, 1857, gives some practical help here. The petitioner there was a wife who had obtained a decree of divorce in one of the United States which, like the South Dakota decree here, was invalid in England. She then sued for divorce under the Act of 1857, upon charges of adultery founded upon cohabitation of her husband with another woman after the date of the American decree. Her petition was dismissed because, as the Court said, she had no right to complain of the consequence which might naturally be expected to follow the course she had taken. The Court considered that "it might be said she had connived at the adultery of her husband." The first question in the present case is whether connivance must be found, and I think it must.

Again, it is a statutory bar to the petitioner's claim for divorce if he was accessory to the adultery of which he complains. To establish this it is probably not essential that there should be such proofs as would make out a charge in a criminal Court. There, as Sir James Fitzjames Stephen says in his treatise on Criminal Law, an accesssory is one "who directly or indirectly counsels, procures or commands" the doing of a criminal act. What makes a petitioner

(1) 1 Sw. & Tr. 551.

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accessory to adultery within the meaning of s. 31 of the Matrimonial Causes Act, 1857, was under consideration in the House of Lords in *Gipps* v. *Gipps* (1), and Lord Chelmsford said that the word "seems to be used in that section in its popular sense of aiding in producing or contributing to produce some effect." In my judgment, however, the present petitioner was accessory in the strict sense of the word to all the relations of his wife with the co-respondent.

If it were possible for me to say that the petitioner was not accessory to or conniving at the adultery in question I must have found that he was guilty of wilful misconduct which conduced to it. This finding is necessarily involved in the more serious findings I have already stated. I must have regarded this element in the case in the light of the whole series of facts. Further, I am not convinced that the petitioner really supposed that an English marriage can be dissolved in South Dakota upon a pretext such as was set up in this case, or that the Courts of South Dakota really had any jurisdiction over him. It would be impossible, therefore, for me to grant a decree even if connivance and the being accessory were not established, as I find them to be.

The petition must be dismissed.

Solicitors: *R. C. Bartlett & Co.; The King's Proctor.*

(1) 11 H. L. C. 1.

J. R. B.

ADMIRALTY.

(In Prize.)

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April 24;
May 27;
July 13.

THE REGINA D' ITALIA.

Prize Court—Practice—Costs—Unsatisfied Order—Enforcement in Vice-Admiralty Court—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *ss.* 4, 9, 23—*Prize Courts Act*, 1915 (5 & 6 *Geo.* 5, *c.* 57), *s.* 2.

The plaintiffs brought an action in prize in the Vice-Admiralty Court at Gibraltar against the Crown by its proper officers in respect of the detention of the plaintiffs' steamship. The action was remitted to the Prize Court in London and eventually was dismissed with costs. Part of the costs remaining unpaid, the defendants took out a summons for a declaration that the decree of the Prize Court as to costs was enforceable in Gibraltar, where it was believed the plaintiffs had assets:—

Held, that by the combined effect of the provisions of the Naval Prize Act, 1864, and the Prize Courts Act, 1915, the decree was enforceable in the Court at Gibraltar; that the power to make the declaration was not discretionary; but that even if the power were discretionary it must be exercised judicially, and as the decree was valid and uncomplied with the Court was obliged to make the declaration as prayed.

Summons (adjourned into Court) for a declaration that an order of the Prize Court made on February 6, 1919, that the plaintiffs should pay the taxed costs of an action in which they had failed, was enforceable within the jurisdiction of the Prize Court of Gibraltar.

The plaintiffs were Lloyd Sabaudo, an Italian corporation, the owners of the steamship *Regina d' Italia*. The defendants were "Captain John Harvey, R.N., Commander of H.M. Ship *Cormorant*, and the proper officer of the Crown." The action was instituted in the Vice-Admiralty Prize Court of Gibraltar for damages in respect of the detention of the *Regina d' Italia*, which was stopped on October 25, 1914, by the *Cormorant* in pursuance of orders from the Admiralty and taken into Gibraltar, where portions of her cargo were seized as prize but ultimately released. In May, 1917, the action was remitted to the Prize Court in London, and on February 6, 1919, the President, Lord Sterndale, dismissed the action with costs.

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The defendants' costs were taxed at 834*l.* 3*s.* 10*d.* The plaintiffs had given security for costs in the sum of 300*l.*, and the balance 534*l.* remaining unpaid, the defendants took out the present summons in order to enforce payment in Gibraltar, where the plaintiffs' vessels were in the habit of calling.

L. F. C. Darby for the defendants in support of the application.

Balloch for the plaintiffs.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 13. THE PRESIDENT (LORD MERRIVALE) read the following judgment: Application is made in this case for what seems, on the face of it, an order of course, under a comparatively recent statute which regulates the procedure of this Court in its jurisdiction in prize, and of Vice-Admiralty Courts sitting in prize. So far as I know, however, no such order has been heretofore made, and as what is sought is a means of enforcing payment of an unsatisfied decree for costs where the taxed bill exceeds the security, the precedent which is sought to be set may be of consequence to parties other than those immediately concerned.

The suit in which the application is made is a personal action within the jurisdiction in prize which was brought by the plaintiffs, an Italian corporation, in May, 1915, in the Prize Court at Gibraltar to recover damages in respect of an alleged wrongful seizure and detention in prize of their steamship *Regina d' Italia* in the course of a voyage in October, 1914, from New York to Genoa. The *Regina d' Italia* was arrested in the Straits of Gibraltar and taken into Gibraltar for examination. After examination, certain consignments of copper and of rubber which formed part of her cargo were discharged and made the subject of proceedings in prize, but were eventually released. I am not aware that any cause of condemnation was instituted

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in respect of the goods in question, and I therefore do not think it greatly affects the merits of the present proceeding that the plaintiffs proceeded by original writ in prize, as for an alleged wrong, instead of requiring the captors by monition to institute an action and in such action presenting their claim.

The action brought by the plaintiffs proceeded in the Court at Gibraltar until January 5, 1917, when, upon the application of the defendants, it was transferred into this Court. It came to hearing on February 5 and 6, 1919, and on February 6 Lord Sterndale, then President, pronounced against the claim of the plaintiffs and condemned them in the defendants' costs. Pending the proceedings in this Court application had been made by the defendants in due course for security for costs. On June 18, 1918, security for 300*l.* was ordered, and on July 3 that sum was paid into Court. On May 19, 1924, the defendants' costs were taxed at 834*l.* 3*s.* 10*d.* The plaintiffs did not attend upon the taxation. The excess of the costs beyond the amount of the security remains unpaid.

The case comes before the Court now upon application under the Prize Act, 1915, for a declaration that the order as to costs of February 6, 1919, is enforceable within the jurisdiction of the Prize Court of Gibraltar, where it was said at the hearing it probably could be enforced against assets of the plaintiffs. The application was resisted by counsel for the plaintiffs on grounds which bring under consideration not only the express provisions of the Act of 1915, but various important questions of principle as to the award and enforcement of costs in prize—more particularly where neutral claimants are concerned—the possibility of the extension of the liabilities of neutral claimants in prize by Order in Council, and the limits within which the statutory powers of the Court ought to be exercised where subjects of foreign States are concerned. The substance of the matter so far as the plaintiffs are concerned is, I think, that having given security for costs in a proceeding in prize, some years ago, upon a supposition arising out of current

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knowledge that their liability as to costs would probably be limited to the security so given, they are confronted, after a considerable lapse of time, with the possibility of being required to satisfy in full the decree as to costs which was made against them at the hearing. The element of surprise —if that term can be here properly applied—led to a very full argument at the hearing before me, and induced me to consider in detail the elements of the case, the nature of a judgment in prize for costs, the means by which it is enforceable, here or elsewhere, the effect of the statute under which the application is made, and the nature of the obligation which the statute imposes on the Court.

The express statutory provisions which exist with regard to costs in prize are the sections as to costs in the Naval Prize Act, 1864. These require (inter alia) that a claimant shall give security for costs in an amount to be determined by the Court. The Prize Act, Russia, 1854, which, like previous Prize Acts, was enacted for the duration of a war, had for the first time given statutory sanction to a long-established practice of requiring claimants to give security in a sum of 60*l*. The Act of 1864, among the "permanent enactments"—to use the words of the preamble—which it substitutes for "such provisions as had been usually passed at the beginning of a war," directs by s. 23 that "the claimant shall give security for costs in the sum of sixty pounds; but the Court shall have power . . . . to direct security to be given in a larger sum, if the circumstances appear to require it." These statutory provisions must no doubt be considered in the light of the pre-existing practice of the Court. This is concisely stated in the celebrated letter on procedure in prize written by Sir William Scott and Sir John Nicholl in 1794 to the American Minister in London, Mr. Jay: Pratt's edition of Story's Notes on the Principles and Practice of Prize Courts, p. 7. The concise statement as to costs is contained in the following words: "Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned

therein." Marriott's Formulary, published in 1802 by Sir William Scott's predecessor in the Court of Admiralty, shows the form of bail bond which was used. The English surety bound himself to the captor in the sum of sixty pounds "to pay such expences as shall be adjudged by this Court or by his Majesty's High Court of Appeals for prizes." An erroneous impression that the obligation as to costs of a claimant in prize was satisfied by the finding of security for a prescribed sum might perhaps arise if the provision of the Act of Parliament in its limited terms is coupled with the practical immunity from any personal liability under an Admiralty decree which was enjoyed by a foreign claimant. It would be easy also to infer from some reported observations of learned judges that complete liability for costs, at the discretion of the Court, did not exist before the introduction of rules which expressly declare that costs in prize are at the discretion of the Court. Shortly after the enactment of the Prize Act, 1854, Dr. Lushington, as judge of the High Court of Admiralty, said in the case of *The Leucade* (1): "Costs alone, independently of damages, I mean law costs in the common acceptation of the term—were very seldom, if ever, given in the Prize Court of the Admiralty to either the captors or the claimants; I hardly remember a single instance." Instances of awards of costs, though in rare cases, are found among the numerous reported judgments of Lord Stowell, and the terms of the bail bond and of the letter to Mr. Jay make it plain that the Court had full power, at its discretion, to award the costs of the suit against a claimant. The Act of 1864, so far as it did not modify the existing powers of the Court, confirmed them. The discretion of the Court over costs, therefore, was not introduced by rule either in 1898 or in 1914. What was so introduced was an extension of the process of execution for costs. The Prize Rules, 1898, provided that any decree or order other than a decree of condemnation or restitution, and not expressly provided for by the Act of 1864 or the Rules, might be enforced by monition, or in the same manner as a

(1) (1855) Spinks, P. C. 217, 220.

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judgment decree or order of the Court in its Admiralty jurisdiction. (1) In Vice-Admiralty Courts decrees and orders were to be enforced in like manner with decrees and orders of the Supreme Court of the Possession in the exercise of its ordinary jurisdiction. (2)

In the High Court and in Vice-Admiralty Courts, the prescribed forms annexed to the Rules of 1898 contemplate the enforcement of costs against unsuccessful parties as well as against sureties liable under bail bonds by monition, and in case of default by attachment. Monition and attachment were the ancient customary means in the Admiralty Court of enforcement of its decrees, but by s. 17 of the Admiralty Court Act, 1861, decrees and orders for payment of costs were rendered enforceable by the common law processes of execution. It is said that for some years common law process was never used in an Admiralty cause (Williams & Bruce, Admiralty Practice, 1st ed.), but various decrees of recent date have made it clear that in the instance jurisdiction in Admiralty civil process of all kinds may be employed against all parties, non-resident as well as resident, provided they have effects within the jurisdiction.

In the present case it was not contended before me that the decree for costs pronounced by the Court in 1919 was other than a valid decree. Nor was it seriously argued that within this jurisdiction it could not lawfully be enforced in the manner provided for by the Prize Rules, 1914, that is by the processes specified in the Rules of the Supreme Court, O. XLII., r. 17. I think, too, that the matter is one of practice and procedure, and is within the provisions of the statutes which gave power to make the Prize Rules, 1914. Some weight was attached to the provision in O. XLII., r. 23, which makes a judge's order a condition precedent to the issue of execution out of the High Court of Justice where more than

(1) Rule 247 of the "Rules of Court touching the practice in prize proceedings to be observed in Her Majesty's High Court of Justice."

(2) Rule 247 of the "Rules of Court touching the practice in prize proceedings to be observed in Vice-Admiralty Courts and Colonial Courts authorised to act as Prize Courts."

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six years have elapsed since the date of the judgment or order; but the main grounds of objection to the desired declaration were that the power to make it is discretionary, that to enforce costs beyond the amount of the security ordered by the Court and outside the jurisdiction of the Court would be a departure from the general principles on which the jurisdiction in prize is exercised, and that a case of hardship arises by reason of lapse of time.

The jurisdiction which is invoked by the Procurator-General is a statutory jurisdiction. If a discretion is to be exercised it must be exercised in conformity with the statute which creates the power. The powers and duties of the Court with regard to the matter in question do not depend only upon the Prize Courts Act, 1915. They had their origin in the Naval Prize Act, 1864. The Act of 1864 by ss. 4 and 9 provides that the High Court of Admiralty shall have power to enforce any order or decree of a Vice-Admiralty Prize Court, and goes on to say in unqualified terms that "Every Vice-Admiralty Prize Court shall enforce within its jurisdiction all orders and decrees of the High Court of Admiralty in Prize Causes." This is the basis upon which the Legislature enacted in s. 2 of the Prize Courts Act, 1915, that "a Prize Court may, as respects any cause or matter within its jurisdiction, and on the application of the proper officer of the Crown, declare that any order or decree made by it . . . . is enforceable within the jurisdiction of another Prize Court, and shall, on the like application, have power to enforce any decree or order which another Prize Court has declared to be enforceable within the jurisdiction of such first mentioned Court." By s. 3, sub-s. 4, of the same Act it is further enacted that the powers conferred thereby are "without prejudice to . . . . the obligation imposed on Prize Courts by s. 9 of the Naval Prize Act, 1864."

Having regard to the cumulative effect of the provisions of the Act of 1864 and the Act of 1915 I am inclined to think that I have no other duty in this case than to determine judicially whether, in point of legality, the decree in question is enforceable within the jurisdiction of the Vice-Admiralty

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Prize Court of Gibraltar. I cannot doubt that it is. If the power to make the declaration which is sought is discretionary —and I take the view that it is not—the discretion is to be exercised judicially. Inasmuch as the decree in question is valid and subsisting, and such as in substance could have been made under the general jurisdiction of the Court before the Act of 1864, and has proved unenforceable here for six years, and remains uncomplied with, I find myself obliged to declare, as prayed by the defendants, that the order of the Court as to costs made in this cause on February 6, 1919, is enforceable within the jurisdiction of the Prize Court in Gibraltar.

Solicitors for the plaintiffs: *Pritchard & Sons.*
Solicitor for the defendants: *The Treasury Solicitor.*

E. C. M. T.

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July 15, 16, 20, 28.

ADMIRALTY.

THE REFRIGERANT.

Shipping—Towage—Breach of Contract—Abandonment of Tow by Tug—Salvage Expenses incurred—Exceptions in Towage Contract—"During the towage service"—"Defaults of the master or crew of the tugboat."

The plaintiffs contracted to tow the defendants' steamship *R.* from L'Orient to Liverpool for 400*l.*, "no cure, no pay, no salvage." The contract contained the following terms: "During the towage service the master and crew of the tugboat become the servants of the owners of the vessel in tow, and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to or occasioned by the vessel in tow, ... or any damage or loss to any person or property whatsoever, although such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the . . . . equipment or towing gear of the tugboat." It was also provided that the plaintiffs should supply a towing hawser sufficient for the purpose, and that the *R.* should have steam available if possible for steering and anchor use. In fact the *R.* did not raise steam until after the events in question.

In bad weather off the Lizard the hawser, which was good and sufficient, parted, but instead of standing by the *R.* the tug went into Falmouth to try to get a new rope. In Falmouth her master asked the master of

the tug *D.* to go out and see if the *R.* wanted assistance, and the *D.* proceeded out. She found the *R.*, but her services were declined, as the master of the *D.* refused to make any agreement. Eventually, however, the *R.* had to take the services of a steam trawler, and paid her 2000*l.* to tow her into Plymouth, where the plaintiffs picked her up and resumed the towage to Liverpool.

The plaintiffs claimed the 400*l.* The defendants counterclaimed for the 2000*l.*, subject to a deduction of 350*l.* on the basis of a quantum meruit for the towage:—

Held, (1.) that whether regarded as a performance of the contract or on the basis of a quantum meruit the plaintiffs were entitled to the 400*l.*; but (2.) that the tug master ought to have stood by the *R.*, and that having improperly left her the tug owners were not protected under the terms of the contract, which covered defaults during the performance of the duties of the contract, but did not apply to a case where the tug master had given up trying to perform the contract in the way in which it was contemplated by the parties that it should be performed; and (3.) that accordingly the defendants were entitled to succeed on their counterclaim for the 2000*l.* paid as salvage.

ACTION OF TOWAGE.

The plaintiffs, Lawson-Batey Tugs, Ld., claimed 400*l.* under a contract entered into with the defendants, the owners of the steamship *Refrigerant*, to tow that vessel from L'Orient to Liverpool. The defendants alleged that the plaintiffs' tug improperly abandoned the performance of the contract, and that the contract price never became payable. They alleged that by reason of the plaintiffs' breaches of contract they were compelled to engage the services of a French steam trawler, and to pay her owners, master and crew 2000*l.* for salvage remuneration, and the defendants accordingly counterclaimed for the 2000*l.*, less 350*l.*, for which they were willing to give credit to the plaintiffs for the towage services rendered on the basis of a quantum meruit.

In their defence to the counterclaim the plaintiffs denied the alleged breaches of contract and in the alternative pleaded that the towage contract contained terms which exempted them from liability. These terms and all the material facts are summarized in the headnote, and are fully set out in the judgment.

Langton K.C. and *Carpmael* for the plaintiffs. It is admitted that the onus is on the plaintiffs to prove that the towing

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hawser was good and sufficient for the purpose, and that if not they cannot rely on the provisions in the towage contract. If, as the plaintiffs contend, the hawser was sufficient, then by the terms of the contract the plaintiffs are relieved from liability for the default, if any, of the tug master, for under the contract he became the servant of the owners of the tow and the tug owners are not liable for damages or loss even if caused by the master's default. The defendants do not allege, and have not pleaded, that the plaintiffs by their servants abandoned the further performance of the contract, they plead that the tug "failed to return," not that she never intended to return—i.e., it is an allegation of improper conduct, a breach of an implied condition that the tug would not leave the tow in danger, but not an abandonment of the contract, as in *The Cap Palos.* (1) In that case the contract was different, and the facts were different, as the contract had been completely abandoned. "During the towage service" means during the performance or attempted performance of the service. In the present case by going into Falmouth to get a new hawser the tug master acted for the best, or at any rate reasonably. Further, the defendants must show that the hand gear on the *Refrigerant* was efficient; if they cannot establish that fact the counterclaim fails, for the tow must be seaworthy.

Dunlop K.C. and *Balloch* for the defendants. On the evidence the hawser was insufficient, but assuming it was sufficient the plaintiffs committed a breach of the contract in leaving the *Refrigerant* in danger and in not picking her up before she had been compelled to take assistance on a salvage basis. A contract of towage implies that the tug will use its best endeavours: *The Minnehaha* (2); see also the recent decision of Roche J. in *The Prince George* (*Cohen, Sons & Co.* v. *Standard Marine Insurance Co.*) (3), where the principles are similarly expressed. This contract implied, speaking generally, a continuous towage. Alternatively, even if some interruption were contemplated, it at least implied that the tug

(1) [1921] P. 458. (2) (1861) 15 Moo. P. C. 133.
(3) (1925) 21 Ll. L. Rep. 30.

should take reasonable care of the tow; it did not contemplate that the tug would leave the tow drifting helplessly up the English Channel in bad weather. The towage conditions in the notice relied on by the plaintiffs have no application except "during the towage service." They do not protect the tug owners when, in the words of Lord Sterndale in *The Cap Palos* (1), they "have ceased, even for a time, to do anything at all" under the contract and have left its performance to others.

Langton K.C. replied.

Cur. adv. vult.

July 28. BATESON J. In this case my judgment is for the plaintiffs on the claim and for the defendants on the counterclaim. It is a claim under a towage contract dated October 27, 1924, whereby the plaintiffs agreed to tow the steamship *Refrigerant* from L'Orient to Liverpool with their tug *Joffre*. The contract included the supply by the tug of a hawser sufficient for the purpose, the vessel in tow to be in seaworthy condition and steam to be available, if possible, for steering and anchor use. "If through any cause whatever the tug is compelled to put into port the charges incidental to the *Refrigerant* to be for the account of the shipowners and those for the tug to be for the tug owners. The contract price for the service to be 400*l*., and the conditions of the contract to be 'no cure, no pay, no salvage.' . . . ." Then there is this notice in the contract: "The following terms apply to and are incorporated in all contracts or services entered into by the company: During the towing service the master and crew of the tugboat become the servants of the owners of the vessel in tow and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to or occasioned by the vessel in tow, or her cargo, or her pilot, master, crew or passengers or any person on board or any damage or loss to any person or property whatsoever, although any such

(1) [1921] P. 458.

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damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the hull, boilers, machinery, equipment, or towing gear of the tugboat, or any of them."

The facts, as I find them, are these: The *Refrigerant* was a vessel of 3421 tons gross, 331 feet long, 46·8 feet in beam and light. She had no propelling engines capable of being, or intended to be, used. She had a crew of seven or eight and two masters, a French and an English one. She could get steam for steering or anchor use, but raised none until after the events in question. The hand steering gear, which was aft, was always used during the part of the services that have to be considered. The *Joffre* was a good ocean-going tug belonging to Lawson-Batey, Ld.; she had two good tow ropes made up of a 4½ inch wire 90 fathoms long, a 15 inch manilla hawser 100 fathoms long, a 5 inch wire 90 fathoms long and an 18 inch coil of 16 fathoms. No question arises as to the wire, but the manilla is attacked. Nearly all the evidence was devoted to this rope, and I will deal with it in detail later. The actual gear that was used for the towage was a combination of the three tow ropes, i.e., the 4½ inch wire, the 5 inch wire, and the 15 inch manilla, making a total length of some 280 fathoms altogether.

On October 28, 1924, about 3.30 P.M., the towage began, the wires being joined together and shackled on with a shackle to the manilla, the wires being next the ship and the manilla next the tug. Neither vessel was fitted with wireless that was of any value. The tug had wireless, but she had no operator. At the time of starting the master of the tug knew that the *Refrigerant* was not providing any steam. He and the master of the *Refrigerant* seem to have thought that the tackle was good enough to tow any ship like the *Refrigerant* with hand gear only in use. She had been lying up for some time, and no doubt the gear was stiff and required a considerable amount of oiling and greasing all through the service. The steam steering gear on the ship was amidships, the hand steering gear being aft. One man only was

stationed at the wheel with another man standing by in case of need for help. The second man was only used when they were coming out of port, and apparently he was not wanted unless there was some excessive action required at any time. On October 29 strong winds were encountered, and the ship sheered a good deal. I am satisfied with the evidence of the mate of the tug that the man or men who were steering the *Refrigerant* could not really see properly forward, and they themselves say that they had to keep the tug a little on the starboard bow in order to see where she was going. There was no officer by the men, to see how the tug was steering, out at the side of the ship. The man who was assisting the steersman does not seem to have been watching the tug, and therefore the man at the wheel would have great difficulty in keeping the ship aft of the tug, especially as he was steering no compass course, and in fact had not any compass to guide him. I am advised under these circumstances that the steering would very likely be slow, and that the ship would not be at all likely to follow the tug well if navigated in that way. There was somebody on the bridge, but he was a long way away for the conveyance of any order, and no order seems to have been conveyed. Everybody seems to have been quite satisfied with the gear, and no exception was taken to it. On October 30 the weather got worse. It blew hard towards night, getting up to a gale, lulling down, and then breaking out again on the early morning of the 31st, and all through this towage this rope stood very well. About 2 A.M. on the 31st, having met this bad weather, the tug master thought it advisable—and the French master agreed—that they should make for shelter. The tug therefore turned round to make for Falmouth, altering from her heading of about N.W., with the wind more or less abeam, to N.E. Putting the wind behind the ship in this way would no doubt make the ship sheer worse and take runs on either quarter, and so put a great strain on the rope, and it eventually parted about 30 fathoms from the tug's stern. This happened when the vessel was some fourteen miles from the Lizard. It may be that the tug in turning round turned a little quickly. It

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may be that the ship did not follow as she ought to have done, or as quickly as she might. It may be a combination of those causes, or it may just have been bad luck in the conditions that prevailed at the moment when they turned. But I am satisfied it was not any fault in the rope. The weather was still rather bad. The ship was helpless, and in those circumstances the tug went away without saying anything to the ship, and after attempting to speak the Lizard with her Morse lamp, which gave out as soon as the name of the tug had been passed to the Lizard, she went into Falmouth, arriving there about 6 A.M. In the meantime she had hove in the rope, and found it was broken at the 30 fathoms. She did not know what had happened to the wires; she did not know anything as to what the condition of things was on board the ship, but left her in a position as to which, the master said, when he got in, he asked the tug *Dandy* to go and see if she required assistance, and said he was afraid she might drift ashore at the Lizard. Apparently, therefore, knowing the ship might drift ashore on the Lizard, the master went away in the circumstances that I have detailed. It is said that the weather was too bad to hear voices and too bad to pick up a wire hanging from the ship and to get it connected again. I do not know whether there was a megaphone on board the tug or not, but at any rate I should have thought that the tug might have stayed there, and have let the ship know that she was standing by, even though they might not have been able to talk very much. If she had remained with her tow her presence, with her lights, would have been a means of showing that she was still looking after the ship, even although it was too bad to connect with her, and, of course, in daylight the international code flags could have been used and conversation maintained quite easily.

On getting into Falmouth the tug met the *Dandy* just outside the port, and the captain of the tug told the *Dandy's* captain of the position, who remarked that he would see the *Dandy's* owners and let them know. Eventually the *Dandy* went out, the master of the *Joffre* went ashore, and came back

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about 10 A.M., having been unable to get a rope. So far as the master's actions go—unfortunately he is dead, and I could not hear his evidence—he does not seem to have had any intention of going back to the vessel until he had got a rope. When he was ashore he wired his owners: "Tow rope parted this morning 13 miles off Lizard. Will require new tow rope to resume connection with *Refrigerant*." The owners replied: "We are waiting to hear with interest how this occurred as your telegrams have been very vague and convey practically no information." That letter is not unimportant as to the view which the owners took of what had happened so far as the information given by the master was concerned. They go on: "In the first place you should have stated whether the ship was adrift, as it was you led us to believe that although your rope had broken, the ship was in Falmouth Harbour, and subsequently the tug *Dandy* went out in search, and after a good deal of trouble in getting through to the agents on the telephone we got them to understand we required you to go out immediately, stand by the vessel and tow her into Falmouth when the weather moderates." Clearly their view was that whatever the circumstances were he ought to have stood by the vessel in the first instance. "If the *Dandy* can go out we see no reason why you should not—you always have a hope of getting a wire from the ship and connecting it to the ship's cable, at the present time we do not know what effort you made to keep in touch with the vessel, but to us it appears a bad business to come and report vessel having broken away. Up to the present of course we have no explanation as to why you did not attempt to remain by the vessel. There was always the hope of getting connected again, and bringing her into shelter. So far as new towing hawsers are concerned the prices at Falmouth are prohibitive—further it will take three days at least to make one there. We can do much better here, and are despatching by rail to-day 80 fathoms of manilla and 120 fathoms of wire." Then they speak of what they think the way to tow should be: "We are very much disappointed to hear indeed you did not stand by the

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ship and make an effort to reconnect, and we are anxiously waiting further reports as to the position of the vessel and what has been done. . . . ."

That is a letter from people who know their business and are quite definite in their view that, whatever the circumstances were, the tug ought certainly to have stayed by the ship and not have left her, and I think they were right. At 9 A.M. the same day the *Dandy* went out, and we know that the *Dandy* found the ship and spoke her and offered her services, but as they were on a salvage basis and not on account of the owners of the *Joffre* the master of the *Refrigerant* declined them, and it was not till 1.30 P.M.—in consequence of the orders which the owners gave—that the *Joffre* put to sea, losing of course much valuable time. No doubt the *Dandy* could have held the ship and brought her in in the weather as it was. I have also no doubt if the *Joffre* had gone out there would have been no real difficulty in getting connection again; it might have been somewhat troublesome owing to the fact that the *Refrigerant* had no steam, but still the wire could, I think, have been got hold of by other means than a grab. They could have put a piece of wire round it and hauled it on board the *Refrigerant* (letting it run down the wire and so getting hold of it), or indeed there were other wires on board the ship, which in case of emergency could have been used, and some attempt could have been made and probably would have been successful.

The *Dandy* returned about 7.30 P.M., and the *Joffre*, having again gone out at 1.30, remained out all night, but failed to find the *Refrigerant*. The weather was rainy, and when looking for a ship that may be drifting in any direction in such weather as prevailed, it might quite easily be that the ship would be missed. About 9 or 10 A.M. on November 1 the *Joffre* came back to Falmouth. Meanwhile a trawler, *L'Etoile de l'Est*, had found the *Refrigerant* and had taken her into Plymouth, arriving there about 8 A.M., and the owners of *L'Etoile de l'Est* have been paid 2000*l*. as salvage, a sum both parties agreed was a fair and proper sum for her services. No question therefore arises about that figure.

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On November 2 the *Joffre* found the *Refrigerant* again in Plymouth. On the 4th the *Joffre* got another rope—a second-hand one—and on November 6 the towage was resumed and successfully finished on November 10 in Liverpool. Thus the *Joffre* did get the vessel to her destination, and whether one views it as a performance of the contract—400*l.* being due under the contract—or whether one looks at it from the point of view of a quantum meruit, I think the 400*l.* is a proper sum, and was earned under the contract.

That is the history of the case. [His Lordship then dealt with the history of the rope, which he said he found was good and sufficient.] That being so, having found, as I do, that the master left the ship in the way he did, I have asked the Elder Brethren this question: "Ought the tug master, in the weather described by the weather reports, as I find them, to have left the *Refrigerant* and gone to Falmouth without communicating with the ship?" They answer "No." They point out that, even if the weather was too bad to get real communication by hailing, the tug could have waited till daylight and signalled by flag. I have also asked, having left her, ought the tug master to have gone to Falmouth and remained there as he did without making sure of effective assistance being given in his place? Merely to send out the *Dandy*, who might or might not come to terms, does not seem to be sufficient. The Elder Brethren answer that question in the negative also. I agree with both of those answers. Finding that no new rope was available in Falmouth the tug master certainly ought to have gone out with the *Dandy* or followed out; he knew by 10 A.M. he could not get a rope, and he should have done his best with the wires remaining. If he had done so I cannot believe that there would have been any difficulty in preventing all the trouble that ensued. I am not really saying any more than what the owners themselves said in the letter of October 31 that I have already read.

Those being the facts, and that being the advice that I have received, what is the position under the contract?

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Mr. Dunlop contends that the notice does not protect the tug owners and Mr. Langton contends that it does. He argued that "during the towage service" means "during the performance or attempted performance of the service." The contract was to tow from L'Orient to Liverpool, and, I think, it is implied in such a contract, in the case of a vessel which has no steam for her own propelling purposes, that there may be accidents owing to bad weather and parting of the rope, or by reason of the various matters which may happen in a long heavy tow, without anybody being to blame. It is not a contract to tow without a break, as was suggested by Mr. Dunlop. In all these contracts it must be implied that the parties contemplate an interruption of the service. The price would be prohibitive if there was a guarantee that the towage would be without incident, and business could not be carried on on such terms. Equally, I think it is implied in all these contracts that the tug will do her duty in case of accidents and do all she reasonably can to take care of and protect the ship. I think that is, putting it quite shortly, the result of Dr. Lushington's judgment in *The Minnehaha* (1), and it is re-expressed in the judgment of Roche J. in *The Prince George* (*Cohen, Sons & Co.* v. *Standard Marine Insurance Co.*) (2) So far as it is for me, and so far as it is for the Elder Brethren, we think that it was very wrong for the tug to go away as she did. She ought to have stood by, and she ought not to have stayed away in Falmouth. These sort of accidents happen in many salvage cases where the salving vessel invariably stands by her salved ship, and eventually, although the ropes break, they manage to get into port; they do not abandon a ship in danger of going ashore or merely send a wire to the owners, or only go out when, in effect, they are driven to go out by receiving a wire from the owners so to do.

Did this happen during the towing service? I think not. In my opinion the words "during the towage service" mean while the service is being conducted—not while it is being interrupted, in the sense that the master of the tug

(1) 15 Moo. P. C. 133. (2) 21 Ll. L. Rep. 30, 37.

leaves the ship altogether and goes into port and sends out somebody else to do his work. I think the contract contemplates that the tug and tow shall keep together, because it says, "during the towing service the master and crew of the tug boat become the servants of the owners of the vessel in tow and are under the control of the master or person in charge of the vessel in tow." It seems to me that if the master of the tug goes away and asks somebody else to do his work it cannot be said that those words contemplate such a doing of the work as that. Further than that, as to the words in the rest of the clause, "The company will not be liable for any damage or loss" (leaving out the unimportant words), I do not think that it is "damage or loss" to the vessel when she has been left to get salvage assistance to bring her out of her difficulties. In my opinion that is not damage or loss to the vessel, nor do I think it is "damage to any person or property whatsoever" within the meaning of this clause. I think that the expressions used by Lord Sterndale and Atkin L.J. in *The Cap Palos* (1) support that view. It is true that in that case the facts were different and the contract was different. But if the plaintiffs wanted to protect themselves against the sort of thing that happened in this case I think they ought to have used clear words, and they have not done so. Lord Sterndale says: "I do not think it is necessary to say that in no case can the words 'default of the owner' refer to a breach of contract, but I think that the whole clause points to the exceptions being confined to a time when the tug owner is doing something or omitting to do something in the actual performance of the contract, and do not apply during a period when, as in this case, he has ceased even for a time to do anything at all and has left the performance of his duties to some one else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to some one else for performance." Atkin L.J. says, quoting from the judgment of Scrutton L.J. in *Gibaud* v. *Great Eastern Ry.*

(1) [1921] P. 458, 468, 471.

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Co. (1): "The principle is well known, and perhaps *Lilley* v. *Doubleday* (2) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it."

In my opinion the way in which this towage was contracted to be done was that the tug should tow the ship, with possible interruptions no doubt, but that she should stand by in case of accident and not leave the ship in the way she did. Therefore I think, although those expressions in *The Cap Palos* (3) were used in regard to the owner—who there was the person who had given up trying to do the work—they are equally applicable where the master has given up, as in this case, trying to perform the service in the way in which it was contemplated that it should be performed by the parties to it. For these reasons I think my judgment should be as I have stated.

What are the damages? The damages seem to me to be 2000*l.* There was not any real contest as to that, and I think I must allow the damages at the 2000*l.* that had to be paid to *L'Etoile de l'Est.* It does not necessarily follow that the same sum would have had to be paid to the *Dandy* if she had done the work, but I was not addressed on that matter, and I think I am right in allowing the damages at the sum claimed. As regards costs, on the claim the judgment must be for the plaintiffs with costs and on the counterclaim for the defendants with costs save as to the issue about the rope.

Solicitors for the plaintiffs: *Pritchard & Sons, for Wilkinson & Marshall, Newcastle-on-Tyne.*

Solicitors for the defendants: *Botterell & Roche.*

(1) [1921] 2 K. B. 426, 435. (2) (1881) 7 Q. B. D. 510.
(3) [1921] P. 458.

E. C. M. T.

ADMIRALTY.

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June 18, 19, 23; *July* 15.

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Shipping—Mortgage—Insolvent Shipowners—Mortgagees' Application for Sale —Intervention by Charterers—Mortgagees with Notice of Charterparty— Shipowners unable to perform Charter—Sale by Marshal free from Obligations of Charter.

The plaintiffs were the mortgagees of a vessel which had been chartered by her owners, the mortgagors, for a succession of seasons on the St. Lawrence River with options for renewal which did not expire until 1932. The plaintiffs brought an action in rem against the shipowners, who were in financial difficulties, claiming judgment for the validity of the mortgages and an order for the sale of the vessel by the marshal. No appearance was entered by the defendants and judgment was given condemning the vessel and ordering her sale. Thereupon the charterers intervened and claimed (*a*) a declaration that the charterparty was binding on the mortgagees, who had notice of its existence when the mortgages were executed, and (*b*) an injunction to restrain the plaintiffs from exercising their right to an order for the sale of the vessel except subject to the terms of the charterparty. The interveners also alleged that the mortgages were invalid:—

Held, (1.) that the interveners had no locus standi to dispute the validity of the mortgages but were only entitled to be heard on the question whether the plaintiffs ought to be restrained from exercising their rights in such a way as to interfere with the interveners' contractual rights under the charterparty.

(2.) That whether or not the charterparty was binding on the mortgagees, inasmuch as the shipowners, by reason of their financial position, were incapable of performing it, a sale at the instance of the mortgagees would not interfere with the performance of a contract which was already impossible of performance by the parties thereto: the principle therefore on which Lord Chelmsford decided *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, 300, applied, and the plaintiffs were entitled to an order for the sale of the vessel by the marshal free from the obligations of the charterparty.

Authorities reviewed on the question whether a charterparty entered into with the owners of a ship binds a subsequent mortgagee with notice.

Trial of an issue between mortgagees and charterers (interveners) in a mortgage action.

The plaintiffs (mortgagees) were the Old Colony Trust Co.; the defendants (mortgagors) were "the owners of the steamship *Lord Strathcona* (and freight)"; the interveners were the Dominion Coal Co., Ld., who counterclaimed against both plaintiffs and defendants.

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The facts, which are fully set out in the judgment, shortly stated were as follows: Under two registered mortgages the plaintiffs brought an action in rem against the defendants claiming (i.) judgment for the validity of their mortgages, (ii.) judgment against the ship and freight for the amount due to the plaintiffs under the mortgages, and (iii.) an order for the sale of the ship by the marshal. No appearance was entered by the defendants, and on January 26, 1925, judgment was given by default condemning the ship and ordering her sale. On February 11 the Dominion Coal Co. entered an appearance as interveners, and by an order of March 3 the sale of the ship stood over pending the trial of the issue.

The interveners raised two questions: (1.) They disputed the validity of the mortgages on the ground that the Lord Strathcona Steamship Co. (No. 1), the then owners of the ship, was never properly constituted according to the laws of Canada, and therefore that all the subsequent transfers, bills of sale and mortgages were void. (2.) They alleged that a charterparty entered into in 1914 between themselves as charterers and the Lord Curzon Steamship Co., the company then owning the *Lord Strathcona*, for a succession of seasons on the St. Lawrence River with options for renewal not expiring till 1932, was binding on the plaintiffs as mortgagees who were aware of the existence of the charterparty before the transfer to them of the first mortgage and before the execution of the second mortgage. The interveners accordingly claimed against the plaintiffs and the Strathcona Companies an injunction which, in effect, would prevent the marshal from selling the *Lord Strathcona* except subject to the obligations of the charterparty.

The plaintiffs, in answer to the counterclaim, denied that the charterparty was binding on them; alleged that the security was being impaired and that the owners were not in a financial position to carry out the charterparty; and that by dealing with and treating the mortgagors as owners the interveners were estopped from alleging that the Lord Strathcona Co. (No. 1) was not properly constituted and that

accordingly its subsequent transactions were invalid. The Strathcona Companies did not appear.

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Sir Leslie Scott K.C., *Balloch*, and *F. Hinde* for the interveners. The main question is whether the mortgagees are bound by the charter of which it is now admitted they had notice before the execution of the one mortgage and before the transfer of the other. The second point is that according to Canadian law the mortgages were void because the Lord Strathcona Steamship Co. (No. 1) proceeded to the allotment of its shares without having first filed a prospectus or a statement in lieu thereof, contrary to the provisions of the Canadian Companies Acts, and accordingly all the subsequent transfers and mortgages were invalid and void.

[HILL J. How can interveners take that point? What right have they to do more than intervene to protect their interest?]

They raise the question in order to protect their interests under the charter, for if the mortgages are invalid the plaintiffs have no power of sale at all. The point is one which could have been raised in the name of the Attorney-General in Canada.

[HILL J. You are not raising it in that way and you will have to satisfy me as to the locus standi of the interveners to raise the question.]

On the main question, the dictum of Knight Bruce L.J. in *De Mattos* v. *Gibson* (1), that a mortgagee is bound by a prior charter of which he has notice, has been recognized and acted on for upward of three-quarters of a century. It was referred to and not dissented from in *The Celtic King* (2), and in *Herne Bay Steamboat Co.* v. *Hutton.* (3) Stirling L.J. treated *De Mattos* v. *Gibson* (1) as an authority for granting an injunction: see also *Cory & Co.* v. *Stewart* (4), where, however, it is not clear whether the charter was before or after the execution of the mortgage. A well established commercial doctrine ought not to be disturbed: *London Founders*

(1) 4 De G. & J. 276, 282.
(2) [1894] P. 175.
(3) [1903] 2 K. B. 683.
(4) (1886) 2 Times L. R. 508.

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Association v. *Clarke* (1); *British and Foreign Insurance Co.* v. *Wilson Shipping Co.* (2); *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (3)

Assuming the charterparty to be binding on the mortgagees, they can only sell free from its obligations if they can show that the charterers will not be prejudiced by the sale, e.g., if the shipowners themselves could not perform the charterparty. The onus is on the mortgagees to prove this, and the facts show that but for the interference of the mortgagees the shipowners would have tendered the vessel to the charterers in the spring of the present year. The charterparty was remunerative; the mortgagees have prevented the vessel from trading, and they cannot be heard to say that the owners by reason of their financial disabilities could not have successfully traded with the vessel. The sale therefore can only take place subject to the purchaser undertaking to carry out the charterparty.

W. A. Greene K.C., *Alfred Bucknill*, *H. S. G. Buckmaster* and *Sinclair Johnston* for the plaintiffs. Except in the case of a charter by demise made before the mortgage a mortgagee, even with notice, is not bound by a charterparty entered into with his mortgagor, and the headnote to *De Mattos* v. *Gibson* (4), where the contrary is stated, does not correctly state the law, as the Court of Appeal has said on more than one occasion. The dictum of Knight Bruce L.J. in that case should be limited to immovable property—restrictive covenants running with the land. So far as chattels in general are concerned contracts between the owner and another person do not affect a third person who acquires the chattel from the owner: see per Scrutton L.J. in *Barker* v. *Stickney* (5); see also the observation of Buckley L.J. in *London County Council* v. *Allen* (6). Wood V.-C. in *Messageries Impériales Co.* v. *Baines* (7) merely followed the dictum in *De Mattos* v. *Gibson* (4), and it is obvious from the expressions

(1) (1888) 20 Q. B. D. 576, 581.
(2) [1921] 1 A. C. 188, 199.
(3) [1922] 2 A. C. 250, 257.
(4) 4 De G. & J. 276.
(5) [1919] 1 K. B. 121, 131.
(6) [1914] 3 K. B. 642.
(7) (1863) 7 L. T. 763.

used that he did not agree with it. Further, even these cases do not apply to the case of a sale by the marshal, which is always free of all liens and liabilities. In *The Celtic King* (1) it was assumed that notice of the charterparty made a difference and the question now raised was not argued, but so far as it goes that case is in the plaintiffs' favour. See also, as to notice of a debt, *The Aneroid* (2). But assuming the interveners are right in their contention as a general proposition, the highest it can be put against the plaintiffs is that they must not interfere with the performance of the charterparty. This charterparty has become impossible of performance; the mortgagors are hopelessly insolvent, they are not in a position to free the ship from her liabilities and get her out to Canada to tender her to the charterers, and the case therefore is not in any event within the dictum of Knight Bruce L.J., but is in fact within the principle on which Lord Chelmsford decided *De Mattos* v. *Gibson* (3). The action of the owners in relation to the ship and the nature of the charterparty itself are such as to impair the mortgagees' security, and they are entitled to disregard the charterparty and to obtain an order for the sale of the ship free from its obligations.

Sir Leslie Scott K.C. in reply. The observations of Scrutton L.J. in *Barker* v. *Stickney* (4) had no reference to chattels, which have a peculiar value as regards their use, and quoad ships the position is different. The *Lord Strathcona* was specially built for the charterers' trade in the St. Lawrence.

K. S. Carpmael appeared for the Lord Curzon Steamship Co.

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July 15. HILL J. read the following judgment. This case involves the relative rights of the plaintiffs as mortgagees of the *Lord Strathcona* and the interveners as charterers of the *Lord Strathcona* under a charterparty made in 1914 for seasonal employment of the ship over a period of years.

(1) [1894] P. 175.
(2) (1877) 2 P. D. 189.
(3) 4 De G. & J. 276, 300.
(4) [1919] 1 K. B. 121, 131.

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Before the completion of the ship the charterparty in question was entered into between the interveners and the building owners, the Lord Curzon Steamship Co. The charterparty was expressed to be " of a good British registered steamship to be built " of a specified description, and the *Lord Strathcona* was the steamship. There were several changes in ownership by transfers from the Lord Curzon Steamship Co. to the Century Shipping Co., thence to the Lord Latham Steamship Co., thence to the Lord Strathcona Steamship Co. (No. 1), and thence to the Lord Strathcona Steamship Co. (No. 2). The Lord Strathcona Steamship Co. (No. 1) became owners by transfer on December 18, 1919, and the Lord Strathcona Steamship Co. (No. 2) by transfer on June 22, 1920. All these successive owners knew of the charterparty. With intervals of requisition the charterparty was performed down to and including the season of 1924, subject to this, that a question arose after the war as to whether the charterparty had ceased to be subsisting, and from season to season agreements were made whereby that question was kept open. That question was litigated in Canada and is under appeal to the Judicial Committee. So far the charterparty has been held to be subsisting.

In order to raise money for the purchase the Lord Strathcona Steamship Co. (No. 1) borrowed 70,000*l.* of the British Steamship Investment Co. upon the security of a first mortgage dated December 19, 1919. In June, 1922, the plaintiffs became transferees of that first mortgage. Earlier in the same year—1922—the plaintiffs made advances to the then owners, the Lord Strathcona Steamship Co. (No. 2). The money was required for repairs and other disbursements. It was a dollar advance and was secured by a second mortgage dated May 10, 1922, which was an account current mortgage. The first mortgage carried interest at 6½ per cent. and the second mortgage at 8 per cent. At the time of the granting of the first mortgage the British Steamship Investment Co. knew of the charterparty and its terms. Before the execution of the second mortgage and therefore also before the transfer to them of the first mortgage (if that fact be material) the

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plaintiffs had received from the interveners a letter dated April 24, 1922. I hold that that letter was notice to the plaintiffs of the charterparty and its terms.

The ship came off service under the charterparty on November 20, 1924, and was loaded with grain for Antwerp, where she arrived on December 13, 1924. While she was on that voyage the plaintiffs determined to exercise their rights as mortgagees. The owners were in default. On the first mortgage there was owing 28,800*l.* and interest from June 19, 1922. There had been a failure to pay an instalment of principal moneys on that date and the whole balance had thereupon become payable. On the second mortgage the principal moneys were payable on demand. On December 4, 1924, the plaintiffs demanded payment. The amount due was 40,109 dollars 38 cents, which at the rate of exchange on December 4, 1924, equalled 8565*l.* 16*s.* 1*d.* Interest was also due from October 31, 1924. Altogether the total indebtedness for principal and interest on December 4, 1924, was over 42,000*l.* In these circumstances, and having regard also to the fact that the ship's No. 2 special survey was overdue and that the necessary repairs would have to be done before the ship could again cross the Atlantic, the plaintiffs gave directions that the ship should proceed from Antwerp to the United Kingdom and the owners complied. The plaintiffs made a further advance to the owners to enable the ship to get away from Antwerp. She arrived at Newport, Mon., towards the end of December, 1924.

On December 31 the plaintiffs began the present action. The ship was arrested. The owners entered no appearance. On January 26, 1925, judgment was given by default condemning the ship and ordering a reference and appraisement and sale. On February 11, 1925, the Dominion Coal Co., Ld., the charterers, intervened. By an order of March 3, 1925, the sale was directed to stand over until further order and other directions were given, in pursuance of which the interveners delivered a defence and also a counterclaim to which they made the Strathcona Companies and the

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plaintiffs defendants. The Strathcona Companies have not appeared. The issue for trial is between the plaintiffs and the interveners. The interveners have put forward two contentions: (1.) that all transactions with and by the Strathcona Companies are invalid because neither company was formed according to the laws of Canada, and (2.) that the charterparty is binding on the plaintiffs as mortgagees and that the plaintiffs can only exercise their rights subject to the charterparty.

As to the first contention I asked and received no satisfactory answer to the question: What right have the interveners to raise this contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what locus standi they have to dispute the validity of the plaintiffs' mortgages. But I need not further consider this, for the interveners took the benefit of the performance of the charterparty by the Lord Strathcona Steamship Co. (No. 2) as owners for several seasons and cannot now be heard to say that the Strathcona Co. never were owners. As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reason of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is whether the interveners are entitled at all, or on the facts of this case, to limit the plaintiffs' right to procure a sale by the Court. They cannot question the judgment in rem. Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale? A similar question would be involved if, instead of proceeding in rem, the plaintiffs had taken possession and proposed to sell or to use the ship without regard to the charterparty.

The charterparty made in 1914 was for ten consecutive St. Lawrence seasons commencing with 1915, with an option for five more seasons and a further option for three more

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seasons. The option for five more seasons was duly exercised by notice to the Strathcona Co. on October 24, 1922. The time for the exercise of the further option has not yet arrived. The interveners, therefore, have a subsisting contract with the Strathcona Co. whereby the Strathcona Co. have undertaken to put the ship at the interveners' disposal for the St. Lawrence seasons of 1925–29 inclusive, with a further option as to 1930, 1931, and 1932. While I am on the charterparty it will be convenient to state that it provides a cancelling date of May 15 in each year, and adds, "but if cancelled any season said cancellation to apply to that one season only." The St. Lawrence season lasts about seven months, and the charterparty leaves the owners free as to the disposal of the ship during the rest of the year.

The matter at issue is of importance both to the interveners and the plaintiffs. The interveners say that the ship is peculiarly fitted to their trade and are anxious to retain her. The plaintiffs, if they must sell with the benefit of the charterparty, are very unlikely to realize enough to pay the debt, interest and expenses. For the plaintiffs, the ship was valued in the open market and free of engagements at 53,000*l.* in February last and 50,000*l.* at the end of June. This is for a ship in good condition, and the necessary repairs will cost some 3000*l.* But the plaintiffs' evidence is that if offered for sale subject to the charterparty the ship will be unsaleable or will realize a very small sum. The charterparty requires the ship to be British registered, and, as the interveners' trade is a Canadian coasting trade, they must have a British ship, and no foreign owner could buy and perform the charterparty. He would have to transfer to British owners. The interveners gave evidence of an offer of 45,000*l.* for the vessel with her survey passed (that is, with some 3000*l.* spent on her) and with a guarantee of freight at 4*s.* 6*d.* (the charterparty rate) for seven seasons. But the offerer was Scandinavian and he could not himself become the owner and fulfil the charterparty. Further, as affecting the price, the charterparty engagement is of a peculiar kind, apart from the number of years. A buyer would have to consider not merely whether

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the charterparty will be profitable, but what he should do with the ship during the five months of each year and whether the year's working would show a profit. He would also have to consider that the interveners had an option for a further three years after 1929. It seems to me that these considerations must depress the selling value, and I accept the plaintiffs' evidence that the charterparty would probably prevent a sale altogether. Even if sold free of all engagements, in her present condition it is doubtful whether, after deduction of the marshal's expenses and costs of the action, the proceeds would do more than satisfy the present claims against the ship.

Such being the interests involved, the interveners say that the law is clear. They say, first, that the charterparty does not impair the security, and, secondly, if it does, the plaintiffs had notice and cannot deal with the ship without regard to the charterparty. The plaintiffs' contentions are, first, that notice or no notice a mortgagee is not bound by a charterparty made before the mortgage; secondly, that this charterparty is one which impairs the security; and, thirdly, that the owners were in December and are unable to perform the charterparty, being without funds and without credit, and that a sale will do nothing to prevent the performance of the charterparty which the owners were already incapable of performing.

From what I have already said, it is apparent that the charterparty is such as to impair the security. It must always have greatly hampered the mortgagees' power of sale. It seems to me to be even more hampering than the agreement in *The Celtic King*.(1) But the mortgagees had notice. This raises the important question which was the main subject of argument. For the purposes of this argument it makes no difference whether the charterparty is such as impairs the security or not. Does a charterparty with the owner of a ship bind a subsequent mortgagee with notice? The dictum of Knight Bruce L.J. in *De Mattos* v. *Gibson* (2) has been shown by later cases to be unsound. As said by

(1) [1894] P. 175.

(2) 4 De G. & J. 276.

Buckley L.J. in *London County Council* v. *Allen* (1): "Notwithstanding what was said by Knight Bruce L.J. in *De Mattos* v. *Gibson* (2), it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant"; and by Scrutton L.J. in *Barker* v. *Stickney* (3): "As to personal property it was found that the general rule of Knight Bruce L.J. was quite impracticable, and *Taddy & Co.* v. *Sterious & Co.* (4), *McGruther* v. *Pitcher* (5), and *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (6) have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he was himself a party to the contract in which the stipulations were made." Notwithstanding this, is the more limited dictum of Lord Chelmsford in *De Mattos* v. *Gibson* (2) still law as regards ships, where he says: "It is true that he took his mortgage with a full knowledge of the charter, and that he must therefore abstain from any act which would have the immediate effect of preventing its performance."

Several cases were referred to. In *Messageries Imperiales Co.* v. *Baines* (7) Wood V.-C. held a purchaser with notice bound by the charterparty made before purchase, but expressly founded his decision on *De Mattos* v. *Gibson* (2) and said: "It is not competent for me to fall back on any opinion I may have entertained before that case." In *Cory & Co.* v. *Stewart* (8), in the Court of Appeal, it does not appear from the report that the mortgage was before the charterparty. In *Herne Bay Steamboat Co.* v. *Hutton* (9) the injunction referred to in the judgment of Stirling L.J. would be an injunction against the owner, and the dictum does not help. *The Celtic King* (10) has a more direct bearing though not a direct authority, for, first, the arguments and the judgment all proceed on the assumption that notice makes all the difference, and, secondly,

(1) [1914] 3 K. B. 642, 658.
(2) 4 De G. & J. 276, 282, 299.
(3) [1919] 1 K. B. 121, 132.
(4) [1904] 1 Ch. 354.
(5) [1904] 2 Ch. 306.
(6) [1915] A. C. 847.
(7) 7 L. T. 763, 764.
(8) 2 Times L. R. 508.
(9) [1903] 2 K. B. 683, 692.
(10) [1894] P. 175, 187.

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Barnes J. keeps it open whether even without notice ordinary engagements of the ship may not bind a subsequent mortgagee. As to contracts which do not impair the security made during the mortgage there is abundant authority that they bind the mortgagee, though all that the Merchant Shipping Act, 1894, s. 34, provides is that " except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof "; and all that the mortgagee not in possession does is to leave the owner in possession and in a position to enter into contracts for the employment of the ship, which are contracts to which the mortgagee is not a party.

Some day this difficult question will have to be decided. But in the present case I have come to the conclusion that the interveners fail for another reason. In my judgment the plaintiffs have established their third contention. The owners are incapable of further performing the charterparty, beyond all hope of recovery. I take the position of the owners in December last at the end of the Antwerp voyage. To enable the ship to leave Antwerp they had to borrow of the plaintiffs a further 3500 dollars—say about 720*l.* They owed, and still owe, the Antwerp agents—Ruys & Co.—88,732 francs, and this claim Ruys & Co. can enforce against the ship—something over 900*l.* The ship was bound to undergo repairs and overhaul before she could again cross the Atlantic or indeed be employed at all. No. 2 special survey was due in May, 1923; an extension was granted until May, 1924, and a further extension over the 1924 St. Lawrence season. It could not further be postponed. Moreover, the ship had not been dry docked since March, 1924. If the necessary repairs and overhaul to enable the ship to pass her survey and be made again fit for sea are carried out the cost will be over 3000*l.* It is anticipated by the owners that 1500*l.* of that will be recovered from the underwriters—but, of course, the recovery will not be immediate. [His Lordship dealt with the figures in the various

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repair accounts and with the cost of getting the vessel from the United Kingdom to Montreal for the 1925 season, and continued:] Before the owners could begin to earn the charterparty freights they had to find over 4300*l.*—or in immediate cash over 5800*l.* They could not possibly do it. They had no cash and no credit. They had the ship and nothing else. The ship was subject to the plaintiffs' mortgages on which over 42,000*l.* was owing and interest running at the rate of 2550*l.* per annum. Nothing could prevent the plaintiffs recovering a judgment in rem, and the ship being subject to it. Ruys & Co. were in a position to sue in rem for their disbursements. It is idle to suppose that the owners could have raised any money on the security of the ship. Nor does it affect the position that, as appears from the evidence, the charterparty freight would have shown a substantial profit on the 1925 St. Lawrence season. The owners were powerless to get the ship away from the United Kingdom.

It was contended for the interveners that for the winter months 1924–25 the owners suggested and could have secured a profitable voyage to the Plate and back with coal and grain. Mr. Harling suggests in his evidence that there would have been a profit. Mr. Angier, called for the interveners, gave evidence and figures which show that there would have been a heavy loss. Mr. Glover for the plaintiffs gave evidence and figures which showed a loss, though not so heavy a loss as that which would result from Mr. Angier's evidence. It is to my mind clear that there would have been a loss, and that at the end of such a voyage the owners' position would have been worse than if they had laid the ship up until the time came for the 1925 charterparty season. And, before such a voyage could be undertaken, there would still be the necessity of the owners having to find the money for repairs.

I am satisfied that the mortgagees' interference did nothing to prevent the owners fulfilling the 1925 season. Then, what as to the future? The owners are still bound by the charterparty. But in succeeding years the owners will be

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in a still worse position. Having no funds to get the ship away, they cannot employ her, even if any profitable freight should offer; and it is notorious that freights are worse now than in December last. While the ship is idle, lay up expenses will be running on, and probably the ship will become subject to possessory liens or rights of some harbour or dock authority to detain and sell and to maritime liens for wages—for some one must be kept on board. In the meantime the mortgage interest will be accumulating, and the plaintiffs, if they choose to do so, can sue the owners in personam in Canada and recover judgment for principal and interest and force the Strathcona Co. into liquidation. Moreover, Ruys & Co.'s claim (for which they have entered a caveat) will remain unsatisfied and nothing but payment could prevent them from issuing a writ in rem and recovering judgment and an order for sale.

In my judgment the Strathcona Co. was in December last and is now incapable of any further performance of the charterparty, and the arrest by the plaintiffs has not done, and a sale at their instance will not do, anything to interfere with the performance of the charterparty. The owners are incapable of performing it, beyond all hope of recovery. The principle upon which *De Mattos* v. *Gibson* (1) was actually decided by Lord Chelmsford applies, and as to that principle there is not, and never has been, any question. I, therefore, am of opinion that the judgment for the plaintiffs will stand and the costs of and occasioned by the intervention will be the plaintiffs' costs against the interveners. Their original costs they have got against the ship.

Solicitors for the plaintiffs: *Ince, Colt, Ince & Roscoe.*

Solicitors for the interveners: *W. A. Crump & Son.*

Solicitors for the Lord Curzon Steamship Co.: *Charles Lightbound & Co.*

(1) 4 De G. & J. 276, 300.

E. C. M. T.

[IN THE COURT OF APPEAL.]

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Divorce—Practice—Permanent Maintenance—Time for making Order—Relation between permanent Maintenance and Decree Absolute—Application to dismiss Suit for want of Prosecution—Duty of Judge to retain Control of Proceedings until Decree Absolute or Abandonment of Suit—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1.

By s. 1, sub-s. 1, of the Matrimonial Causes Act, 1907, "The Court may, if it thinks fit, on any decree for dissolution . . . . of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable . . . .":—

Held, that the power to make the order arose "on any decree for dissolution . . . . of marriage"; that those words did not mean that the order must be made at the same moment that the decree for dissolution was made; and that "on" might mean before, or simultaneously with, or after act done, according as reason and good sense required with reference to the context. It might be made before the decree absolute and in anticipation of it, upon materials which enabled the Court to make the order for the maintenance at the same time as the decree for dissolution.

Waterhouse v. *Waterhouse* [1893] P. 284 and *Cavendish* v. *Cavendish* [1913] P. 138 followed.

On October 15, 1923, the wife filed a petition for dissolution of marriage on the ground of the husband's adultery. On February 23, 1924, an order was made by consent for payment of alimony pendente lite. On March 24, 1924, a decree nisi was made, the husband not defending the suit, and the custody of the children was given to the wife. Negotiations took place as to the amount of the permanent maintenance, but no result was arrived at. No application having been made by the wife to make the decree nisi absolute, the husband, on April 21, 1925, took out a summons to dismiss the suit for want of prosecution. In the meantime, on April 2, 1925, the wife filed a petition for permanent maintenance of herself and her children. On April 27, 1925, the summons to dismiss was heard before Swift J. sitting in Divorce. In the affidavit in opposition to the summons the wife's solicitor stated that the wife would proceed to apply for the decree absolute as soon as the Court had made the necessary order to secure the maintenance of the wife and to provide for the maintenance of the children of the marriage, and the security ordered by the Court had been given. Swift J. refused to make any order upon the summons "except that the same do stand adjourned pending maintenance order." On appeal

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Held, that although an order for permanent maintenance could be made before decree absolute the judge before making such an order ought to be reasonably assured that the decree would be applied for and that the application would be pressed with due diligence.

Held, therefore, that the order adjourning the summons to dismiss ought to have contained the words "stand over generally with liberty to restore," so as to prevent it being absolute, and that the order must be so amended.

APPEAL from an order of Swift J.

The following statement of facts is taken from the written judgment of Warrington L.J.: On October 15, 1923, the respondent to this appeal presented her petition in the Probate, Divorce and Admiralty Division for the dissolution of her marriage with the appellant on the ground of his adultery. Pending the suit, alimony was, by consent, allowed to the wife at the rate of 2000*l.* a year. On March 24, 1924, she obtained a decree nisi for dissolution. The six months during which cause might be shown against the decree nisi being made absolute expired on September 24, 1924, but no step was taken by the petitioner to obtain a decree absolute. On April 2, 1925, a petition for permanent maintenance and maintenance of children was filed. On April 21, 1925, the appellant (the husband) applied to the Court by summons that the suit be dismissed for want of prosecution, owing to the petitioner's delay in obtaining a decree absolute. The summons came before Swift J. on April 27, when he refused to make any order, except that the summons stand adjourned pending maintenance order with a direction as to costs. From this the present appeal is brought.

In opposition to the summons the petitioner's solicitor filed an affidavit, in which he gave an account of certain negotiations initiated by the appellant with a view to providing maintenance for the petitioner as explanation of the delay in prosecuting proceedings for that purpose, and in the course of such affidavit he stated as follows: "Mrs. Fox has not proceeded to apply for the decree absolute owing to the delay on the part of the respondent in making the provision which I was informed he proposed to make for the benefit of Mrs. Fox and her children. The petition for

permanent maintenance and for maintenance of children would have been filed immediately after the decree nisi had been obtained but for the requests and representations made by and on behalf of the respondent, and Mrs. Fox will proceed to apply for the decree absolute as soon as the Court has made the necessary order to secure maintenance for the petitioner and to provide for the maintenance of the children of the marriage and the security ordered by the Court has been given." And he continued: "I am informed and verily believe that the respondent now resides in Paris in the Republic of France, and I am advised that it is necessary that the question of permanent maintenance and maintenance of the children should be disposed of and the security ordered by the Court should be given by the respondent before the decree absolute is made by reason inter alia of the fact that the respondent has certain powers of appointment which he may not be able to exercise in favour of the petitioner after decree absolute."

The appeal was heard on May 18 and 19, 1925.

Sir John Simon K.C. and *T. J. O'Connor* for the appellant. The effect of the order made by the learned judge is that the wife is under no obligation to obtain a decree absolute before she obtains an order for permanent maintenance. An order for permanent maintenance can never be made until a decree absolute has been pronounced. Here the wife has been discreetly dilatory. The husband cannot put down a motion for a decree absolute. Here the wife has really been given a soft option. She is put into a position to see whether it is worth her while to get a decree absolute. There may be good reason why the six months have run into twelve months. But it is submitted it is quite wrong that an order for permanent maintenance should be made first and a decree absolute afterwards. It would put it in the power of a vindictive wife to drive a hard bargain with her husband, if for example he wished to marry again.

1. Alimony pendente lite continues until a decree absolute has been pronounced or the suit dismissed, that is, it continues

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so long as there is a lis pendens: *Ellis* v. *Ellis*. (1) Under the Matrimonial Causes Act, 1857, divorce was effected in one step (s. 31) by the Court pronouncing a decree dissolving the marriage. By the Matrimonial Causes Act, 1860, the procedure was split up into two steps: decree nisi and, after an interval of not less than three months, decree absolute (see s. 7). By the Matrimonial Causes Act, 1866, the period of three months was extended to six months (s. 3). The lis therefore notwithstanding the decree nisi continues until decree absolute or dismissal of the petition and the alimony pendente continues for the same period: *Ellis* v. *Ellis*. (1)

2. There is nothing that a respondent to a petition for dissolution of marriage can do to hasten the making of a decree absolute except to move to dismiss it for want of prosecution.

The petitioning wife has three courses open to her: (*a*) She may apply to have the decree made absolute; (*b*) She may say that although she has a decree nisi she elects to take a decree for judicial separation instead: *Mycock* v. *Mycock* (2); *Parsons* v. *Parsons* (3); or (*c*) She may do nothing, and allow her petition to be dismissed.

The Court has no jurisdiction to order permanent maintenance until after a decree absolute has been made: *Bradley* v. *Bradley*. (4) Swift J. had therefore no power to make the order he did in the present case. By s. 5 of the Matrimonial Causes Act, 1859, s. 5, the Court "after" a final decree of dissolution of marriage may inquire into the existence of marriage settlements and make orders with reference to the property therein comprised.

[*Bayford K.C.* Our contention is that the Court may make an order for maintenance before, but not for payment till after, the decree absolute has been made.]

It is submitted on the authority of *Bradley* v. *Bradley* (4) that the jurisdiction of the Court to order maintenance only arises "on" the decree nisi being made absolute.

Sect. 1, sub-s. 1, of the Matrimonial Causes Act, 1907,

(1) (1883) 8 P. D. 188.
(2) (1870) L. R. 2 P. & M. 98.
(3) [1907] P. 331.
(4) (1878) 3 P. D. 47.

which empowers the Court "on any decree for dissolution or nullity of marriage" to order the husband to secure to the wife such gross or annual sum of money as it may deem reasonable is nothing more than a reproduction of s. 32 of the Act of 1857, with the necessary change of phrase owing to the decree being split up into nisi and absolute: see *Scott* v. *Scott.* (1) It is submitted therefore that the alteration brought about by the repeal of s. 32 by s. 1 of the Act of 1907 has not altered the meaning of the word "on."

A similar question to that in this case arose in *Midwinter* v. *Midwinter* (2) on s. 45 of the Act of 1857, and it was there held that the Court had no jurisdiction before final decree to make an order as to the wife's property, but that it might direct an inquiry as to it.

While the parties remain husband and wife the Court has no jurisdiction to make an order for permanent maintenance. The jurisdiction only arises on the wife ceasing to be a wife. The Court has no jurisdiction to make an order nunc pro tunc. *Cavendish* v. *Cavendish* (3), in which it was held that the Court had jurisdiction under s. 1 of the Act of 1907, before a decree nisi for dissolution of marriage had been made absolute to confirm the report of the registrar recommending maintenance for the wife to order the husband to pay after the decree should have been made absolute the maintenance by monthly or weekly sums, was, it is submitted, wrongly decided.

Here the wife is endeavouring to obtain an appointment by deed to her by the husband under his father's will during the time she is his wife. The case is very similar in its circumstances to *Lewis* v. *Lewis.* (4)

Bayford K.C. and *T. Bucknill* for the respondent. The whole of the delay from the time of the making of the decree nisi is due to the action of the husband.

The Act of 1907 by s. 2 repeals s. 32 of the Act of 1857. The Act of 1907 came into operation where there is both a decree nisi and a decree absolute. Under s. 1 of the Act the

(1) [1921] P. 107.
(2) [1892] P. 28.
(3) [1913] P. 138.
(4) [1892] P. 212.

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Court has power to suspend the pronouncing of a decree absolute until the husband has executed a proper document for securing maintenance to the wife. It is submitted that under that section a wife as soon as a decree nisi is pronounced may obtain a report from the registrar as to maintenance and an order for the execution of a deed securing it, although she cannot get an order for payment until after the decree is made absolute. That was what was done in *Cavendish* v. *Cavendish*. (1) The word "decree" at the beginning of s. 1 of the Act of 1907 refers both to a decree nisi and a decree absolute. The security is for maintenance from the time when the decree absolute is pronounced.

[WARRINGTON L.J. It looks as if the security might come before the decree absolute.]

And if so the amount to be secured must have been previously settled.

If an order for maintenance is not made before the decree absolute is pronounced there may be a hiatus during which the wife may receive nothing. The alimony pendente lite will have come to an end on the making of the decree absolute. An inquiry before the registrar must have taken place before the husband could be called upon to pay or secure the maintenance. The Court must have gone into the facts before it could determine what the order should be. The point arose on s. 32 of the Act of 1857 in *Waterhouse* v. *Waterhouse*. (2)

[POLLOCK M.R. That is a strong decision from the point of view you are putting to us.]

The form of order in that case shows that the order asked for in this case can be made. (3)

The cases cited on the other side do not deal with this particular point.

In *Bradley* v. *Bradley* (4) the question was whether an order for permanent maintenance could be made after a decree absolute had been made, and the Court there put a limited meaning on the word "on" and held that the order could be made after a decree absolute had been pronounced. In

(1) [1913] P. 138.
(2) [1893] P. 284.
(3) [1893] P. 287.
(4) 3 P. D. 47.

Sidney v. *Sidney* (1) the only question was whether an appeal would lie direct to the House of Lords from that part of the decree which dealt with maintenance, and it was held that it would not. The judgment in that case was given with reference to s. 56 of the Act of 1857.

Ellis v. *Ellis* (2) shows that the lis is pendens up to the time of the decree absolute, and that alimony pendente lite therefore continues up to the final decree absolute. But it only continues up to the time when payment of permanent maintenance can be made.

[POLLOCK M.R. referred to *Laxton* v. *Laxton* (3).]

That case was decided a long time before *Waterhouse* v. *Waterhouse*. (4)

[POLLOCK M.R. You need not trouble about that case.]

Midwinter v. *Midwinter* (5) was a decision on s. 45 of the Act of 1857—an altogether different section, and has no bearing on the present case. All that the Court there decided was that there might be an inquiry before decree absolute.

Cavendish v. *Cavendish* (6) is the first case on the point after the passing of the Act of 1907. It was there held that an order for permanent maintenance might be made before decree absolute to take effect from the making of that decree.

In *Scott* v. *Scott* (7) the question was whether seven years after the making of the decree absolute came within the expression "on" the making of the decree, and it was held that it did not. The authorities on the point are there dealt with by Scrutton L.J. (8) He there refers to *Reg.* v. *Arkwright* (9), in which it was held that the word "on" or "upon" might either mean before the act to which it related, or simultaneously with the act done, or after the act done, according as reason and good sense required with reference to the context and subject matter of the enactment.

[SARGANT L.J. Here if you expand "on" to "on the occasion of" it would clearly embrace all three.]

(1) (1867) 36 L. J. (P. & M.) 73; reversing (1866) L. R. 1 P. & M. 78.
(2) 8 P. D. 188.
(3) (1861) 30 L. J. (P. & M.) 208.
(4) [1893] P. 284.
(5) [1892] P. 28.
(6) [1913] P. 138.
(7) [1921] P. 107.
(8) Ibid. 125.
(9) (1848) 12 Q. B. 960, 970.

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In *Reg.* v. *Humphery* (1) Tindal C.J. said that "upon" might mean either "before" the act to which it related, or "simultaneously with" the act done, or "after" the act done, according as reason and good sense required the interpretation, with reference to the context and the subject matter of the enactment. Here, on the construction of s. 1 of the Act of 1907, it is submitted that "on" means "before," "at" or "after" the making of the decree absolute.

[WARRINGTON L.J. If the Court may suspend the pronouncing of its decree until after a deed has been executed, the assumption is that an order for its execution has been made.]

[POLLOCK M.R. I think an election ought to be made at some time.]

Sir John Simon K.C. referred to the Matrimonial Causes Rules, 1924, r. 56 and r. 69 (*a*) and r. 95 of the old rules.

[WARRINGTON L.J. Rule 96 is the important rule.]

Sir John Simon K.C. in reply. Unless there is something special in this case the appellant should be entitled to the order. My main proposition is that it is not right that a petition for permanent maintenance should be used by the wife for the purpose of obtaining an inquiry to enable her to decide whether it is sufficiently advantageous to her to take a decree absolute. It is not, it is submitted, a fair construction of the Act and rules that the wife should be given an option whether she will divorce the husband or not. The statute lends no countenance to the view that the wife is entitled to get this as a preliminary to a decree absolute.

There is no reason why the wife in this case should not at once file in the registry an application that the decree nisi should be made absolute.

[POLLOCK M.R. referred to *Covell* v. *Covell.* (2)]

It is submitted that the words "such decree" in s. 2 of the Act of 1907 refer to a decree for dissolution of marriage.

On construction the word "on" does not mean "before": see per Lord Sterndale M.R. in *Scott* v. *Scott.* (3)

(1) (1839) 10 Ad. & E. 335, 370. (2) (1872) L. R. 2 P. & M. 411.
(3) [1921] P. 107, 120.

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Waterhouse v. *Waterhouse* (1) was an undefended case, and the rule there referred to by Lindley L.J. has now gone.

There is no ground shown for the order made by the learned judge that there should be an order for maintenance first. It is suggested that the wife should now irrevocably elect whether she will apply for a decree absolute.

It is submited therefore :—

1. That s. 32 of the Act of 1857 referred to decrees for dissolution of marriage.

2. That s. 1 of the Act of 1907 also refers to such decrees.

3. That under both there are provisions for bridging over the gap between the decree absolute and the inquiry : see the last words of s. 32 of Act of 1857 and s. 1, sub-s. 2, of the Act of 1907.

4. That the view taken by Lord Sterndale and others that the word " on " means on or a reasonable time after is right.

5. There is only one case in which anything of this kind can be done before dissolution and that is the case mentioned in the concluding words of s. 1, sub-s. 1, of the Act of 1907 —namely, until a deed ordered by the Court has been duly executed.

[He also referred to *Goodden* v. *Goodden*. (2)]

Cur. adv. vult.

June 17. The following written judgments were delivered.

Pollock M.R. On October 15, 1923, Hilda Louise Fox filed a petition for the dissolution of her marriage with the respondent Arthur William Fox on the ground of his adultery.

On February 23, 1924, by consent, an order was made for the payment of alimony pendente lite at the rate of 2000*l.* per annum, payable monthly free of tax, and on March 24, 1924, a decree nisi for the dissolution of the marriage was ordered, the respondent not defending the suit, and the custody of the four children of the marriage was given to the petitioner.

(1) [1893] P. 284. (2) [1892] P. 1.

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Negotiations as to the amount of the permanent alimony were entered upon and continued for some time, but no result was reached; and as no application was made to make the decree nisi absolute, on April 21, 1925, a summons was issued by the respondent to dismiss the suit for want of prosecution.

Meantime on April 2, 1925, a petition for permanent maintenance of the petitioner and her children was issued.

On April 27, 1925, the summons to dismiss for want of prosecution came before Swift J. sitting in Divorce, and he made no order upon it, "except that the same do stand adjourned pending maintenance order." From the affidavit filed on her behalf, the Court is informed that the petitioner has not proceeded to apply for the decree absolute owing to the delay on the part of the respondent in making provision for the petitioner and the children, and "Mrs. Fox will proceed to apply for the decree absolute as soon as the Court has made the necessary order to secure maintenance for the petitioner and to provide for the maintenance of the children of the marriage and the security ordered by the Court has been given."

The respondent appeals from the order of April 27, on the ground that the maintenance ought not to be made independently of, and unless upon, the decree nisi being made absolute, and also on the ground that the petitioner is put under no terms or conditions as to the course that she will take, and that the general adjournment of the summons to dismiss the suit for want of prosecution "pending maintenance order" makes such an order the key of the position; while the respondent is left in uncertainty as to which of the three alternatives open to her the petitioner will adopt—namely, (1.) Apply for the decree nisi to be made absolute; (2.) apply for a judicial separation; or (3.) abandon further proceedings.

The power of the Court to require the husband to secure to the wife permanent alimony was given to it under s. 32 of the Matrimonial Causes Act, 1857, now repealed and replaced by s. 1 of the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12),

but the effect of the two sections is for the present purpose of this appeal the same. The first section is obviously intended to refer to the decree absolute, for there was no decree nisi at that time, and the later section has, I think, the same intention. The power arises "on any decree for dissolution of the marriage." That does not mean that the order must be made at the same moment that the decree for dissolution is made. "On" may mean before, or simultaneously with, or after act done, according as reason and good sense require, with reference to the context: see the judgment of Lord Denman C.J. in *Reg.* v. *Arkwright.* (1) It may be made before the decree and in anticipation of it, upon materials which enable the Court to make the order for the maintenance at the same time as the decree for dissolution: see *Waterhouse* v. *Waterhouse* (2) and *Cavendish* v. *Cavendish.* (3) It may be made after the decree for dissolution has been pronounced: see *Bradley* v. *Bradley.* (4) The system provided is clear. Alimony pendente lite can be made as late as after a decree nisi for dissolution of the marriage has been made, and is to continue until, on the decree absolute for dissolution, its effect ceases, and it is replaced by the order—which comes into force at that moment—for permanent alimony or maintenance, as the case may be: see *Ellis* v. *Ellis* (5), where the sequence of the orders is pointed out. Cotton L.J. (6) said: "Until the final decree the Court can make no permanent provision for the wife." In *Bradley* v. *Bradley* (7), however, Sir James Hannen points out that the effect of the judgment of the House of Lords in *Sidney* v. *Sidney* (8) was to decide that the jurisdiction of the Court to make an order for permanent alimony does not arise till the Court has pronounced the decree of dissolution—that the decree for alimony is ancillary to the decree for dissolution of the marriage, though it may be made after that decree has been pronounced, for the word "on"

(1) 12 Q. B. 960, 970.
(2) [1893] P. 284.
(3) [1913] P. 138.
(4) 3 P. D. 47.
(5) 8 P. D. 188.
(6) Ibid. 189.
(7) 3 P. D. 47, 50.
(8) 36 L. J. (P. & M.) 73.

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is to be taken to have an elastic meaning—in effect it means "on the occasion of": see also per Lord Sterndale M.R. and Scrutton L.J. in *Scott* v. *Scott*. (1) None the less, the decree absolute is essential as creating the occasion when the jurisdiction arises.

In my judgment, therefore, the fact that a decree absolute for the dissolution of the marriage is to be, or has been made, must be kept clearly in view, otherwise there would be no jurisdiction to make the order for permanent maintenance.

The present order appears to overlook that fundamental consideration. Under it there is no power to bring the matter of the petitioner's delay before the Court, unless and until an order for maintenance has been made, and without any undertaking to the Court that the petitioner will ever take the course under which alone its jurisdiction as to the maintenance order arises. It does not appear clearly to this Court that such was the intention of the learned judge with whose discretion—if judicially exercised—I should hesitate long before interfering. More likely the order was drawn up without appreciation of its full effect, and it imperfectly represents the intention of the learned judge; but as it stands, it appears to place the order for maintenance and diligence in the prosecution of the suit in their wrong order, and to afford an opportunity to a wife to exercise an unreasonable pressure upon her husband.

By s. 5 of the Matrimonial Causes Act, 1859: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements, ... and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." In *Bradley* v. *Bradley* (2) Sir James Hannen treated "after" in this section as equivalent to "on" in the section referred to above—an interpretation which must be assented to as reasonable and necessary to the two sections fitting together. By s. 1, sub-s. 1, of the

(1) [1921] P. 107, 121, 125. (2) 3 P. D. 47.

Matrimonial Causes Act, 1907, the Court may suspend pronouncing the decree until such a deed as is necessary to secure the above purpose has been executed. These sections are important, as they enable the Court to deal with the parties whose marriage is to be dissolved as man and wife, and thus to require a settlement to be made by a husband who has power to appoint to his wife, while it is still possible for him to do so, and before he loses the power upon the dissolution of his marriage, and the Court can impose the penalty of delay in pronouncing the decree in order to compel him to execute the deeds necessary. They prove that an order for permanent maintenance can be made otherwise than at the very moment of the decree absolute being pronounced, although such an order is founded upon and is in close relation to the decree: see *Scott* v. *Scott.* (1)

The order made in the present case ought in my judgment to have contained the terms "to stand over generally with liberty to apply to restore," so as to prevent the order for adjournment being absolute, and must be so amended. The result of this case is, I think, to make it clear that the duty of the judge before whom an application for permanent maintenance is made, is to keep in sight the necessity of there being a decree for the dissolution of marriage and not to make an order which, in its effect, is independent of it. It is not necessary to be more precise, for, within the above limits, such orders must be left to the discretion of the judge who has to deal with them.

The order made below must be varied by the addition of the above words, but the appellant has only succeeded so far, and the appeal will be allowed without costs.

Warrington L.J. [after stating the facts as above set out]. Under these circumstances it would seem at first sight that the order appealed from, seeing that it merely directed the summons to stand over, was one esentially in the discretion of the learned judge, but it is contended by the appellant

(1) [1921] P. 107.

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that the Court has no jurisdiction to make an order for permanent maintenance until it makes the decree absolute, and that the learned judge ought to have made an order dismissing the suit, unless within a limited time the petitioner should make and prosecute an application for a decree absolute.

The first question then is whether the Court has jurisdiction after a decree nisi and before making the decree absolute to make an order for maintenance which, of course, will not take effect so far as any payment thereunder is concerned until after the decree absolute.

In two reported cases such orders have been made. The first of these cases is *Waterhouse* v. *Waterhouse*. (1) In that case the decree nisi was pronounced on March 14, 1893, and a petition for maintenance was presented immediately afterwards. The registrar made a report that it was reasonable that the respondent should be ordered to secure to the petitioner 1000*l*. by a charge to that amount on a reversionary interest to which he was entitled under the marriage settlement of his parents. The judge being asked to confirm this report doubted his jurisdiction to do so and refused the order, whereupon the application was renewed before the Court of Appeal. That Court made an order confirming the registrar's report, and ordered that the respondent should within one week after making the decree absolute secure to the petitioner 1000*l*., and an injunction was granted until then restraining the respondent from parting or otherwise dealing with so much of his property mentioned in the report as would not leave sufficient to secure the 1000*l*.

The respondent was not served, as he was keeping out of the way, and there was evidence of danger to the property. But the decision was expressed in a reasoned judgment by Lindley L.J., and is in my opinion an authority binding on this Court. I ought to add that the order was made on June 30, 1893, long before the expiration of six months from the decree nisi.

A similar order in principle was made by Sir Samuel Evans P.,

(1) [1893] P. 284.

in *Cavendish* v. *Cavendish*. (1) In this case the decree nisi was pronounced on July 22, 1912, and the order in question was made on June 30, 1913, nearly a year afterwards.

These authorities are in my opinion sufficient to dispose of the appellant's fundamental objection to the judge's order, but it may be said that the judgment of the Court of Appeal was on the construction and effect of the Act of 1857 and not on that of the Act now in force—namely, the Act of 1907. In my opinion the two Acts are for the present purpose identical, and the judgment of the Court of Appeal is of as much weight in the construction of the later Act as of that in force at its date.

I need not read again s. 1 of the Act of 1907. I think it is clear that it contemplates the execution before the pronouncing of a decree absolute of a proper deed securing maintenance to the wife, seeing that in proper cases it has power to suspend the decree until this has been done. Now the settling of a proper deed and directing it to be executed presupposes an order fixing the amount to be secured and an order for the execution of the deed. Moreover there are cases in which the maintenance of the wife can only be adequately secured by a deed executed while the woman is still the wife of her husband, as, e.g., where the husband has power to appoint to his "wife." An appointment after the dissolution of the marriage would—in ordinary cases at least—be ineffectual. Again there may well be cases in which it is desirable to say the least that the maintenance should come into operation simultaneously with the dissolution, and in such cases preliminary orders of varying kinds directed to fixing the amount of and the mode of securing the maintenance may have to be made under the section. I am of opinion therefore that orders under s. 1 of the Act of 1907 may be made before the final decree is actually pronounced, and that the objection raised by the appellant to the order of Swift J. in point of law is not sustainable.

But that does not dispose of the matter. It may still be

(1) [1913] P. 138.

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that the order is not one which in the exercise of a judicial discretion ought to have been made. On this question there are several points to be borne in mind. An order for maintenance derives its validity from the dissolution of the marriage. It seems to me therefore that the judge before making such an order ought to be reasonably assured that the decree absolute will be applied for and the application pressed with due diligence. It would not be fair to the husband, and would open the way to oppressive action on the part of a spiteful wife actuated by some indirect motive, if she could prosecute an application for maintenance to the end and then refuse to apply for a final decree. The judge should, I think, retain a control over the matter, so that he might interpose at any time if there was reason to suppose anything in the nature of oppression were taking place. So, also, without laying down definite rules as to the exercise of his discretion or saying what he ought to accept as sufficient assurance that in due time an application for a decree absolute will be made, I think he ought at least to retain the power of saying at any time that proceedings shall go no further unless a decree absolute is applied for within a limited time and such application is duly prosecuted.

In the present case the order as drawn up directs the summons to stand over pending maintenance order—namely, until the order has been actually made. This is in my opinion too definite a postponement, and in terms prevents the husband from making use of his summons to invoke the judge's aid if circumstances should arise to indicate that the wife is making unfair use of the proceedings for maintenance.

It may be that the order as drawn up goes further than the learned judge intended. It seems to me to be essential that in such matters the judge should retain control. This would be effected if the appellant's summons were directed to stand over generally with liberty to apply to restore, and I think the order should be varied to this extent, but with this variation should be affirmed. It may be that at some time the necessity for the drastic interference of the judge by putting the wife to the alternative of an immediate

application for a decree or the dismissal of her suit may arise, but on the evidence I do not think it has arisen at present.

SARGANT L.J. In this case there has no doubt been unusual delay in applying to have the decree nisi made absolute. It is as long ago as March 24, 1924, that the decree nisi was pronounced, and ordinarily the application to make the decree absolute would have been made soon after September 24 in that year. But much the greater part of the delay is shown to have been due to an effort which was being made to arrive by friendly negotiation at an agreed provision to be made by the husband for the wife and the children of the marriage, And it was not until after the failure of these negotiations—namely, on April 2 last—that the wife filed a formal petition for permanent maintenance for herself and for maintenance of the children. Shortly after the filing of this petition—namely, on April 21 last—the husband applied to dismiss the suit for want of prosecution. And on this application Swift J., on April 27 last, in the exercise of his discretion, and in view of the pending of the maintenance petition, adjourned the application. In so doing I have little doubt that the learned judge did not contemplate an indefinite adjournment, and intended that the application to dismiss might be renewed at any time should there be further delay in proceeding with the maintenance petition. But unfortunately his order was drawn up in a rigid form, and so as to suggest that the application was to stand over until after the actual making of an order for permanent maintenance. This construction of the order might involve the husband in considerable difficulty and hardship, especially in view of certain indications on the part of the wife's advisers that she might in certain events decline to accept a proposed order for maintenance which she might not think to be adequate, and might, in such a case, elect not to apply to make the decree nisi absolute. Hence the appeal to this Court.

On the hearing of the appeal these indications were

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strengthened rather than weakened. And I certainly understood the respondent's counsel as definitely refusing to pledge her to proceed to make the decree absolute whatever the interim decision of the Court might be as to the provision for permanent maintenance. The question therefore arises in a definite form whether there is any jurisdiction to make an order for permanent maintenance or to allow any proceedings or inquiries for that purpose, except as incidental and subsidiary to a decree absolute. And this question, which is obviously one of considerable importance, has been well and fully argued before us.

Under the Matrimonial Causes Act, 1857, there was no preliminary decree nisi for divorce, but merely a decree absolute. And it is plain therefore that under s. 32 of that Act, which first made provision for permanent alimony or what is now called permanent maintenance, such maintenance could be granted only in case of absolute dissolution of marriage and apparently only on the occasion of the decree. The preliminary decree nisi was introduced by the Matrimonial Causes Act, 1860, but no enlargement or alteration was effected of s. 32 of the Act of 1857. And, again, when in the Matrimonial Causes Act, 1866, the Court was empowered to order a guilty husband to pay monthly or weekly sums to the petitioning wife during their joint lives, it is clear on the language of the Act that the power arose only on the making of a final decree for dissolution. It also appears from *Bradley* v. *Bradley* (1) that the ordinary practice was to make the order for permanent maintenance simultaneously with the decree for dissolution; and though that case only decided that the order for maintenance might be applied for and made within a reasonable time after the decree for dissolution, and did not in terms negative the possibility of its being made before that decree, it certainly indicates that the order is dependent on the making of the decree.

Midwinter v. *Midwinter* (2) is to the effect that no actual settlement can be made before decree absolute, but that

(1) 3 P. D. 47. (2) [1892] P. 28.

inquiries may be made before. But this decision is under another section—namely, s. 45 of the Act of 1857; and there somewhat different considerations apply. *Waterhouse* v. *Waterhouse* (1) is a case in this Court in which an interim injunction was granted after decree nisi to prevent the husband making away with his property and so defeating the order for maintenance which the Court thought should be made to take effect from and after the granting of a decree absolute; and it is certainly the case which is most strongly in favour of the respondent here. But, beyond the fact that there was no argument for the respondent the Court obviously assumed that a decree absolute would be applied for and made in the ordinary way; and the decision merely ensured that the order for maintenance if and when made should be effective. It throughout treated the prospective order for maintenance as dependent on and incidental to the decree absolute for dissolution.

In this state of things the Matrimonial Causes Act, 1907, was passed to amend the Acts of 1857 and 1866 by extending the powers of the Court in relation to maintenance and alimony and leave to intervene. And it has been suggested for the respondent that her position has been improved by s. 1 of that Act. But, when that section is carefully examined, it is in my judgment clear that the decree for dissolution of marriage there referred to is as before a decree absolute; and that, though the section gives an interim power after decree nisi to take steps to have a proper deed or instrument prepared and to suspend the pronouncing of the decree absolute until a deed (where a deed is required) has been duly executed, this is only machinery for the purpose of ensuring that the decree for dissolution is accompanied by a proper provision for maintenance. There is nothing to suggest that the interim proceedings are not entirely conditional on and incidental to the ultimate pronouncing of a decree absolute for dissolution. And it would, I think, be inconsistent with the object of the Act that such proceedings should be taken except as an accompaniment to the

(1) [1893] P. 284.

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single purpose of obtaining a decree absolute. To take them is incompatible, to my mind, with the wife retaining an election to subsequently abandon her suit or to ask for a judicial separation only.

In ordinary cases where there is no reason to doubt that the wife intends to proceed in any event to a decree absolute, and where the expense of the interim proceedings to obtain permanent maintenance is not serious, there can be little, if any, objection to allowing these proceedings to be withheld and carried on unconditionally pending the decree absolute, with a view to making the order for such permanent maintenance coincidently with or even just before the decree absolute. But in a case where there seems to be some doubt as to the ultimate intention of the wife, I think that the judge should keep such a control of the proceedings as will prevent the husband being harassed by troublesome and expensive inquiries which may prove in the end to have been quite unjustifiable. How this control should be secured, whether by a short adjournment only of the husband's application to dismiss for want of prosecution or by a conditional grant of the application, or by the requirement of some assurance or undertaking on the part of the wife or by some other means, is a matter best left to the discretion of the judge in view of the circumstances of each particular case. But it is to be noted that, if the judge is not sufficiently satisfied of the fixed intention of the wife, he can stay the proceedings for permanent maintenance until after the decree absolute has been applied for and made, and leave the wife to obtain her permanent maintenance subsequently, as in *Bradley* v. *Bradley*. (1) Should she suffer in any case through less favourable terms being possible after the marriage has been dissolved than while it was still subsisting (as is hinted to be the case here) that will be the result of her own recalcitrancy. And it will always be possible in such a case to provide her with subsistence between the date of the decree absolute and that of the subsequent order for permanent

(1) 3 P. D. 47.

maintenance by making use of the power given by s. 1, sub-s. 2, of the Act of 1907.

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I agree that the order drawn up should be slightly varied in the way pointed out in the previous judgments, so as to carry out what seems to have been the real intention of the learned judge in this case.

Appeal allowed in part; order varied.

Solicitors for appellant: *Freeman & Son.*
Solicitors for respondent: *Guedalla, Jacobson & Spyer.*

W. I. C.

[IN THE COURT OF APPEAL.]

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In the Estate of J. R. SOUTHERDEN.

ADAMS *v.* SOUTHERDEN.

Probate—Will—Revocation—Destruction by Burning—Mistaken Belief as to Effect of Law of Intestacy—Conditional Revocation—Condition not fulfilled —Wills Act, 1837 (1 *Vict. c.* 26), *s.* 20.

A revocation of a will grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, so that the revocation is contingent upon the fact being true.

Statement in Theobald on Wills, 7th ed., p. 750, adopted by Meredith M.R. in *In re Faris* [1911] 1 I. R. 469, 472, approved and followed.

A testator under the mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property revoked a will which he had made by burning it:—

Held, that the revocation of the will being dependent on a condition which was not fulfilled was inoperative, and the contents of the will so destroyed were admitted to probate.

Decision of Horridge J. affirmed.

APPEAL from the decision of Horridge J.

John Reginald Southerden, by his will dated September 25, 1921, after appointing the plaintiffs his executors thereof, devised and bequeathed all his real and personal estate to

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his wife in the event of her surviving him, and made other dispositions of it in the event of her predeceasing him.

The testator died on September 28, 1923, leaving his wife surviving.

The will was made shortly before the testator and his wife started for a visit to America. On November 20 or 21, 1921, soon after their return, the testator, with the assent of his wife, burnt his will.

The account given at the hearing by the widow of the circumstances under which the will was burnt, which was accepted by the learned judge as correct, was as follows: "I was in the study, after our evening meal, and my husband went to his desk, as it was his usual custom, to take out various papers to relieve his pockets and put them in his desk, and he took one paper and put it on the top of his desk outside. I asked him what it was and he replied, 'Oh, that will we made when we went to America.' I laughed and he shut the desk down and took this will up in the envelope just as it was and said, 'It is no good now, we have returned safely and it is all yours.' I said, 'Yes,' so he said, 'We might just as well burn it.' I said 'Yes,' and he burnt it."

The estate consisted mainly of the freehold house in which the testator resided.

The plaintiffs as executors propounded the will.

The defendant, who was the testator's father and heir at law, opposed the grant of probate and claimed that the testator died intestate.

Horridge J. said that he was quite satisfied that the testator destroyed the will under the erroneous impression that the property would go to his widow under an intestacy. The revocation, therefore, was inoperative and the original will stood.

The defendant appealed. The appeal was heard on June 18, 19, 1925.

W. O. Willis K.C. and *C. G. Talbot Ponsonby* for the appellant. The executors of the destroyed will have been allowed to prove it on the ground that when the testator

burned his will he had no animus revocandi, unless the effect of his intestacy would be that his wife inherited all his property. There is no justification for this decision. There was not a "dependent relative revocation," as in *Powell* v. *Powell* (1) and *Dixon* v. *Solicitor to the Treasury.* (2) In those cases the destruction of the will admitted to probate was conditional upon some other will coming into operation. This doctrine of "dependent relative revocation" can only arise when one will is destroyed with the sole object of making room for another and that other will fails for some reason to become operative. Here there was an unconditional intention to revoke the will within s. 20 of the Wills Act, 1837, so as to create an intestacy. There was a misapprehension as to the result of an intestacy, but that can make no difference. No authority has ever gone so far as to decide that a destroyed will would be admitted to probate because the testator destroyed it under a misapprehension as to the effect of another will he substituted for it. Similarly, it can make no difference that the testator destroyed his will here under a misapprehension as to the law of intestate succession.

Bayford K.C. and *T. Bucknill* for the respondents. The reason the will was destroyed in this case was that the testator thought it was "no good," that is, useless. It was not from any desire to die intestate. The will was useless only if the wife inherited the whole of her husband's property upon his death intestate. In considering whether there was an absolute animus revocandi the real test is whether the husband had any intention to revoke his will if the effect were to deprive his wife of any interest in his property after his death. Clearly he had not. A cancellation in mistake of law or fact is inoperative: *Perrott* v. *Perrott.* (3) The Court will uphold the will in spite of its destruction unless it is satisfied that there was a real intention to revoke in all the circumstances of the case.

[ATKIN L.J. referred to *Campbell* v. *French.* (4)]

That case was decided before the Wills Act, and it is

(1) (1866) L. R. 1 P. & M. 209.
(2) [1905] P. 42.
(3) (1811) 14 East, 423, 439.
(4) (1797) 3 Ves. 321.

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unnecessary for the purpose of the present case to ask the Court to go as far as in that case. The husband had no intention to revoke his will if the effect would be to deprive his wife of any interest in his estate. There was therefore no animus revocandi: *Dixon* v. *Solicitor to the Treasury* (1); *Stamford* v. *White*. (2)

Cancellation is an equivocal act, and of no effect unless there is the animus cancellandi: *Perrott* v. *Perrott*. (3) In that case Lord Ellenborough said: "Mrs. Territt mistook either the contents of her will, which would be a mistake in fact; or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation." That case shows that there may be a destruction of a document which does not revoke it. From the time of the Wills Act the principles laid down by that case have always been acted upon: see *Clarkson* v. *Clarkson* (4); *Powell* v. *Powell* (5); *Beardsley* v. *Lacey*. (6) The mistake here was the belief that the will was no longer "any good."

[ATKIN L.J. referred to *In re Faris* (7), where Meredith M.R. adopted the statement of the law as laid down in Theobald on Wills, 7th ed., p. 750.]

That is sufficient for the respondents. It is clear on the evidence in this case that the sole basis on which the will was destroyed was the mistaken belief on the part of the testator that the whole of his property would go to his wife on his death intestate. The mistake went to the root of the whole matter. The destruction of the will was therefore conditional, and the condition not having been fulfilled the destruction was inoperative.

W. O. Willis K.C. in reply. It is submitted that the intention of the testator was to die intestate. A condition cannot be attached to the destruction of a will where the testator has deliberately expressed his intention to die intestate. Notwithstanding the contention put forward by

(1) [1905] P. 42.
(2) [1901] P. 46.
(3) 14 East, 423, 439.
(4) (1862) 2 Sw. & Tr. 497.
(5) L. R. 1 P. & M. 209.
(6) (1897) 78 L. T. 25.
(7) [1911] 1 I. R. 469, 472.

the other side, the testator, it is submitted, intended to die intestate, and that put an end to any question of mistake. It is not therefore a case in which the Court will read in a condition. All the cases cited on the other side were cases of conditional revocation.

[He also referred to *In re Appelbee* (1); *In re Eeles* (2); *In re De Bode.* (3)]

POLLOCK M.R. This case raises an interesting point of law which has been well argued. It is an appeal from a judgment of Horridge J. given in proceedings in which the executors of the late J. R. Southerden propounded a will made on September 25, 1921. The testator died on September 28, 1923, and when he died the will was not in existence, because he had burnt it. It was said by the executors that although he had burnt it they were nevertheless entitled to set it up. There is no dispute as to its terms. The testator had married in 1901, and partly from his own, and partly from his wife's resources had purchased a house, which practically represented the whole of his estate. After payment off of a mortgage on the house, it was estimated that the estate would be worth about 1500*l.* There was no substantial personal estate which would be subject to the will. In the course of his married life, the testator had again and again stated that all the property of which he died possessed would go to his wife. He had not made a will, because he was content to believe that if he died intestate all his property would go to his wife.

In 1921 he and his wife made a voyage to America and back. Before he started it occurred to him that if the vessel went down, and both he and his wife were drowned, some provision would be necessary to meet that contingency, and he made the will in order to meet it. After his return, according to the evidence of his widow, which the learned judge accepted, when looking through some papers he took up one, being his will, and said to her, "This is no good now:

(1) (1828) 1 Hagg. Ecc. 143. (2) (1862) 2 Sw. & Tr. 600.
(3) (1847) 5 Notes of Cas. 188.

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we have returned safely and it is all yours. We might as well burn it." She assented, and he thereupon burnt it. The learned judge said he had had a great volume of evidence both before and after the destruction of the will showing that the testator still wanted his wife to have everything. The effect of the will was to give everything he possessed to his wife, but if she did not survive the testator it was to pass to his father and his mother-in-law. The learned judge was satisfied that the testator destroyed the will under the impression that all his property would go to his widow under an intestacy, which of course was incorrect, and that therefore the revocation was of no use, and the original will stood.

It was argued, however, by the appellant that the destruction of the will was absolute, that the testator intended to die intestate; that he made no will until he was about to start for America, that on his return it was put into the fire as spent, and that the testator reverted to his original intention to die intestate. By the Wills Act, 1837, s. 20, a will cannot be revoked except by another will, or document executed with the same formalities as a will, "or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." The judge has on the materials before him come to the conclusion that the testator destroyed his will under an impression which was wrong. There are a number of cases which show that where the revocation is based on a condition which is not fulfilled, the intended revocation does not take effect.

In *In re Faris* (1) Meredith M.R., adopting a statement of the law in Theobald on Wills, 7th ed., p. 750, said: "'The true view may be that a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent upon the fact being true: see *Thomas* v *Howell*.' (2) I adopt that statement of the law, merely substituting for the

(1) [1911] 1 I. R. 469, 472. (2) (1874) L. R. 18 Eq. 198.

words 'may be' the word 'is.' The true view is, in my opinion, the view so clearly stated by Mr. Theobald."

I desire definitely to adopt that statement of Meredith M.R. and Mr. Theobald. There is no doubt good ground for saying, that the Wills Act, 1837, in this respect only affirmed the pre-existing law. Sir Francis Jeune P., in *Beardsley* v. *Lacey* (1), said: "The Wills Act (1 Vict. c. 26) in this respect only expresses the law as it stood before; that there may be a physical act of destruction, but that, unless it is performed animo revocandi, it does not have the effect of revoking the document destroyed."

The matter had been considered in a much earlier case. In *Perrott* v. *Perrott* (2) Lord Ellenborough, in giving the judgment of the Court, said: "This, then, raises the question, whether such a mistake, clearly evidenced by what passed at the time of cancellation, annuls the cancellation, and entitles us to act as if the animus cancellandi or revocandi were altogether wanting: and we are of opinion that it does. Mrs. Territt mistook either the contents of her will, which would be a mistake in fact; or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation."

In *Powell* v. *Powell* (3) Sir J. P. Wilde (afterwards Lord Penzance) said: "In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the 'animus revocandi' present."

And if a still later case is desired, *Dixon* v. *Solicitor to the Treasury* (4) makes it quite clear that the learned judge, Gorell Barnes J., accepted the law to the same effect, because he left the following questions to the jury: "(1.) Whether the testator cut his signature off the will with the intention of revoking the will; or (2.) Whether the testator cut his signature off the will with the intention that the

(1) 78 L. T. 25, 27.
(2) 14 East, 423, 439.
(3) L. R. 1 P. & M. 209, 213.
(4) [1905] P. 42, 46.

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will should be revoked conditionally on his executing a fresh will."

The learned judge was justified in the conclusion he came to on the facts, and in holding that the revocation of the will was conditional only and that the condition was not fulfilled. It is impossible to lay down a rule applicable to all cases. It is a question of fact in each case whether the condition is applicable, and if so, whether it has been fulfilled. In substance there was no intention to revoke, and, therefore, no revocation within s. 20 of the Wills Act, 1837. The appeal fails and must be dismissed.

WARRINGTON L.J. The authorities, in my opinion, clearly establish that the mere destruction of a document is an equivocal act, and has no effect unless the destruction is effected with an intention to revoke it. The Court has still to ascertain with what intention the document was destroyed. The cases also establish that if the truth of a particular fact is a condition of the destruction, and the fact turns out not to be true, there is no revocation. A good summary of the law on the point is to be found in the Irish case of *In re Faris.* (1) [His Lordship read the passage from the judgment of the Irish Master of the Rolls already read by the Master of the Rolls and continued:] That passage expresses the true state of the law both as regards questions of construction, and also cases where one has to ascertain whether the destruction was contingent on a certain state of facts being true.

In the present case the fact on the assumption of the truth of which the testator destroyed his will was that his wife would take the whole of the property. That assumption was of course incorrect. If the destruction was contingent on the truth of that fact it would have no effect. The judge has drawn that inference and there was abundant evidence to enable him to do so.

It was strenuously contended that the intention of the testator was to die intestate, and that any mistake as to the

(1) [1911] 1 I. R. 469, 472.

effect of an intestacy did not alter that intention. I think that argument is founded on a fallacy. In my opinion the intention of the testator in destroying the document was that his wife should have the entirety of his property, and he believed that if he died intestate that would be the result.

ATKIN L.J. I agree. The case is of some importance as being the first in which the Court of Appeal has been called upon to express an opinion on the question of conditional revocation. The case depends on the Wills Act, 1837, and therefore it would not be proper to determine it upon cases decided before that Act was passed. The material sections of the Act are ss. 18, 19, 20. One of the provisions of s. 20 is that a will cannot be revoked except by burning, tearing or otherwise destroying it with the intention of revoking it. The Court has therefore to consider whether it was the intention of the testator by burning his will to revoke it, that is, to put an end to the operation of a document which up to that time was believed to be an effective document. To put a will into the fire simply is only destroying a piece of paper: *Clarkson* v. *Clarkson* (1); *Beardsley* v. *Lacey*. (2)

The true answer to the question in the present case is that there was in fact no intention to revoke the will at all. There has been brought into existence in recent years a doctrine which has been described as "dependent relative revocation." The question in each case is, had the testator the intention of revoking his will? The intention may be conditional, and if the revocation is subject to a condition which is not fulfilled, the revocation does not take effect. Cases of dependent relative revocation are mostly cases where the testator has supposed that if he destroyed his will his property would pass under some other document. But the condition is not necessarily limited to the existence of some other document. The revocation may be conditional on the existence or future existence of some fact. If that is proved full effect can be given to the Wills Act, 1837. You must prove that there was in fact a condition. It is a question of fact in each case.

(1) 2 Sw. & Tr. 497. (2) 78 L. T. 25.

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With great respect to the learned judge I should not myself be satisfied with saying that the testator was under a misapprehension of fact—he may have been so, but the misapprehension may not have been as to something that he intended to be conditional—whether it was or not is a question of fact in each case. It is obvious in the present case that the testator was under the belief that on an intestacy the whole of the property would pass to his wife. The words "It is no good" clearly do not mean "This will is no longer operative." They mean "This document is no longer necessary because the law will do all I desire, namely, give you all my property."

I think the true inference of fact is that when the testator destroyed his will in the presence of his wife he did it on the condition that she would take the whole of the property. The condition was not fulfilled, and therefore the revocation was not operative.

I also adopt every word of the passage from Theobald on Wills quoted with approval by Meredith M.R. in *In re Faris.* (1) A statement to the same effect will be found in the article on Wills, of which Mr. Meredith was one of the joint authors, in Halsbury's Laws of England, vol. xxviii., p. 572, § 1142.

In my opinion the decision of the learned judge below was right and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Brash Wheeler, Chambers & Co.*
Solicitors for respondent: *W. W. Young, Sons & Ward.*

(1) [1911] 1 I. R. 469, 472.

W. I. C.

C. A.
1924
Dec. 16, 17.
1925
Jan. 19.

[IN THE COURT OF APPEAL.]

BOWRON *v.* BOWRON.

Husband and Wife—Wilful Neglect to maintain—Complaint barred by Time—Desertion—Continuing Act—Persistent Cruelty causing constructive Desertion—Admissibility of Evidence—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 8.

Desertion is a continuing offence, and a wife can, under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, obtain relief for constructive desertion on the ground of acts of cruelty which caused her to leave her husband, although those acts of cruelty would not avail her to obtain relief for persistent cruelty under the same section by reason of their not having taken place within six months of the complaint, as required by s. 11 of the Summary Jurisdiction Act, 1848.

Decision of the Divisional Court [1924] P. 256 reversed.

Heard v. *Heard* [1896] P. 188 and *Thomas* v. *Thomas* [1924] P. 194 applied.

Appeal from a decision of the Divisional Court (1) of the Probate, Divorce and Admiralty Division (Horridge and Hill JJ.) on appeal from an order of the Penge justices under the Summary Jurisdiction (Married Women) Act, 1895.

The facts and effect of the evidence given by the wife before the justices are fully stated in the following judgment of the Master of the Rolls:—

The wife had taken out a summons charging her husband with wilful neglect to provide reasonable maintenance for her and her child. This summons she withdrew, and took out another summons charging him with desertion, which was a constructive desertion, consisting in the wife having been compelled to leave him owing to the same acts of cruelty as were mentioned in the former summons.

On the second summons the justices found the husband guilty of desertion, and ordered him to pay maintenance at the rate of 1*l.* per week for the wife and 5*s.* a week for the child of the marriage.

The husband appealed, and the Divisional Court reversed their decision on the ground that where desertion is caused by cruelty the matter complained of was the cruelty before

(1) [1924] P. 256.

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the wife left, and proceedings must be taken within six months of the cruelty.

The wife appealed. The appeal was heard on December 16 and 17, 1924.

H. Shanly for the appellant.

Desertion under the Summary Jurisdiction (Married Women) Act, 1895, has the same meaning as under the Matrimonial Causes Act, 1857: *Frowd* v. *Frowd* (1); and being a continuing act, an application under s. 4 of the earlier Act on the ground of desertion need not be made within six months from the commencement of the desertion: *Heard* v. *Heard* (2); *Thomas* v. *Thomas* (3), and stands therefore on a different footing from an application under that section for relief on the ground of persistent cruelty. Desertion may be caused by the intentional breaking off by the husband of the existing matrimonial relations through such cruelty or conduct on his part as to compel her to leave him; it is not necessary that he should actually turn his wife out: *Dickinson* v. *Dickinson* (4); *Koch* v. *Koch* (5); *Charter* v. *Charter* (6); *Sickert* v. *Sickert*. (7) If the husband intends to determine the cohabitation and by his conduct causes it to determine and his wife to leave him, he is guilty of desertion: *Graves* v. *Graves* (8); *Pulford* v. *Pulford* (9); *Jackson* v. *Jackson*. (10)

It has never been considered necessary for desertion under the Summary Jurisdiction (Married Women) Act, 1895, to have continued for two years, as is required under the Matrimonial Causes Act, 1857, in order to obtain relief under the later Act. While the desertion continues, the Court may go back to examine the cause of the desertion, and evidence of cruelty which causes the desertion is admissible, although if the summons had been for persistent cruelty, such evidence would not have been admissible on that summons owing to

(1) [1904] P. 177.
(2) [1896] P. 188.
(3) [1924] P. 194.
(4) (1889) 62 L. T. 330.
(5) [1899] P. 221.
(6) (1901) 84 L. T. 272.
(7) [1899] P. 278.
(8) (1864) 3 Sw. & Tr. 350; 33 L. J. (P. & M.) 66.
(9) [1923] P. 18.
(10) [1924] P. 19.

the six months' limit: *Ellis* v. *Ellis*. (1) There was ample evidence of cruelty, which was admissible, and this case falls within the principle of *Pulford* v. *Pulford*. (2)

L. W. J. Costello for the respondent.

In order to establish desertion there must be on the part of the husband an intention to break off matrimonial relations entirely: *Charter* v. *Charter* (3); it is not sufficient for the husband to tell the wife that she could go when she liked: *Thomas* v. *Thomas*. (4) The wife must show that there was a determination on the part of the husband to force her to desert him. There was no evidence in this case that the husband really intended his wife to leave him, or that he had a deliberate determination to part with his wife. All expressions tending to that result were made when he was drunk.

There are distinct offences comprised in s. 4—namely, desertion and persistent cruelty or neglect to maintain—and if it is open to a wife to abandon one summons for persistent cruelty, and take out another for desertion, that would render nugatory the six months' limit. I submit that you cannot use one state of facts to support a charge of persistent cruelty made within the six months' limit, and then if the six months have already expired use the same state of facts to prove constructive desertion: *Kay* v. *Kay*. (5)

Shanly in reply.

Cur. adv. vult.

Jan. 19, 1925. POLLOCK M.R. This is an appeal from an order of the Divisional Court, which allowed an appeal from the justices of Penge, Kent, and discharged an order made by them, ordering the husband to pay a weekly sum to the wife for the maintenance of herself and a child, on the ground of his desertion.

Some facts must be recalled shortly. The marriage took place on January 2, 1915, and a boy, who is now living in the mother's care, was subsequently born. The husband served in the Great War, and after being demobilized went

(1) [1896] P. 251.
(2) [1923] P. 18.
(3) 84 L. T. 272.
(4) [1924] P. 194.
(5) (1912) 77 J. P. 128.

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with his wife and child to New Zealand in October, 1920, and returned thence to this country at the close of 1921. The evidence given by the wife before the magistrates showed that the husband was frequently intoxicated, that he left his wife several times for weeks together, that he had on four or five occasions—or indeed more—expressed his wish to be rid of his wife, or that he did not intend to live with her any more, and would be happier without her. He did not let his wife know where he was during these absences, and when they were together, he abused his wife in word and deed, and was guilty of persistent cruelty towards her. Ultimately, after several scenes, on February 27, 1923, she left him, "because he told me on so many occasions that he did not care where I went, better earn my own living and earn it on my back."

On April 10, 1924, the wife took out a summons under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with wilfully neglecting to maintain her and having thereby caused her to live separately and apart from him. By s. 8 of that Act, all applications under it have to be made in accordance with the Summary Jurisdiction Acts, and to fulfil the Summary Jurisdiction Act, 1848, s. 11, the application must be made within six months from the time when the matters arose which form the ground of complaint. Thus, as decided in *Ellis* v. *Ellis* (1) and *Kay* v. *Kay* (2), there was a complete answer available to the respondent on this summons. Accordingly it was, on the advice of counsel, withdrawn, and on April 12 a second summons under the same s. 4 for desertion by her husband was taken out by the wife on the basis that desertion, being a continuing offence, no time limit applies to it. At the hearing the justices found the husband guilty of desertion, and ordered him to pay weekly sums for the maintenance of his wife and child.

From that order the husband appealed to the Divisional Court, who set aside the order of the justices, and the wife now appeals.

(1) [1896] P. 251. (2) 108 L. T. 813.

It has been decided in *Heard* v. *Heard* (1), a decision of the Divisional Court with which I agree, that desertion under s. 4 of the Act of 1895 is a continuing act, and that therefore an application to the Court of summary jurisdiction based upon it, need not be made within six months of the commencement of the desertion: see also *Thomas* v. *Thomas* (2) in this Court. Further, *Frowd* v. *Frowd* (3) decided that the desertion referred to in s. 4 above has the same meaning as under the Matrimonial Causes Act, 1857, except that no period is specified as requisite to constitute an offence: and see also *Heard* v. *Heard*. (4) If therefore there was evidence before the justices of continuing desertion on which they could act, their order was right, and cannot be set aside.

The Divisional Court held that there was no evidence of desertion other than of that which Horridge J. termed "constructive" desertion—a phrase used to describe the parting of the wife from the husband where the departure was the act of the wife and not of the husband. The Court thought that though there was evidence which would have justified the justices in finding persistent cruelty on the part of the husband, which caused the wife to leave him, it was not justifiable to regard the facts relevant to this charge upon the question of desertion per se charged in the summons. In my judgment this view is too narrow. As pointed out in *Thomas* v. *Thomas* (2), the act of departure of the one spouse from the other draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention. In *Dickinson* v. *Dickinson* (5) the husband brought to the house a woman with whom he had immoral relations. The wife told the husband that either the woman, or she, must leave the house. The husband told the wife to do as she liked, but that the woman would remain. The wife thereupon left. It was held that the husband was guilty of deserting his wife.

In *Charter* v. *Charter* (6) the husband told the wife to go

(1) [1896] P. 188.
(2) [1924] P. 194.
(3) [1904] P. 177.
(4) [1896] P. 188, 191.
(5) 62 L. T. 330.
(6) 84 L. T. 272.

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where and do what she liked. It was held this was not desertion on his part, because his words were a mere outburst in a quarrel, and not an expression of intention on his part. His wife "took him at his word"—at the face value of his expressions, not at their real meaning or purpose. The result would have been different if there had been an intention on his part to sever their relations.

In *Koch* v. *Koch* (1) the husband refused to discharge a servant with whom he committed adultery, and the wife left; he was held to have deserted his wife. In *Sickert* v. *Sickert* (2) desertion was held proved, for a wife is not bound to stay with a husband who persists in adultery in the matrimonial home. Lord Gorell said: "In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion": see also *Graves* v. *Graves* (3); *Pulford* v. *Pulford* (4); and *Jackson* v. *Jackson* (5), where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention. Did the husband show a determination to force his wife to leave him—did he intend her to go? If he did, and he continues to maintain that intention, there is desertion, even though the wife was the first to leave the matrimonial home.

It is contended for the respondent that in most—if not all—cases where the facts are on lines similar to those before us, the evidence indicating such an intention on the part of the husband would be such as to sustain a summons for persistent cruelty under s. 4 above, and that as the evidence to sustain such a charge is subject to the six months' limit, it ought not to and cannot be made use of to prove the quality of the act of severance between the spouses, for to admit it for this purpose is, in effect, to overcome the restriction of the six months' limit of time.

(1) [1899] P. 221.
(2) Ibid. 278, 282.
(3) 3 Sw. & Tr. 350; 33 L. J. (P. & M.) 66.
(4) [1923] P. 18.
(5) [1924] P. 19.

There is less weight in this argument since the passing of the Licensing Act, 1902, which by s. 5 extends the provisions of s. 4 of the Act of 1895 to a married woman and husband, one of whom is an habitual drunkard. Whether drunkenness is or is not habitual is a question of fact in each case, and it must be a continuing offence and also involve the proof of facts more than six months old.

It may be that the result of this decision will be to give an alternative remedy to the wife in some cases where by lapse of time she is debarred from basing her claim upon persistent cruelty. Effect, however, must be given to the whole of s. 4. The clause which refers to persistent cruelty relieves the wife from proving any intention on the part of the husband to dismiss his wife. As a bully he may subject her to continued cruelty, while yet he wishes to keep her with him. If so, the wife has her remedy if the Court holds that she left him because of his cruelty. Another part of the clause serves to give a summary remedy to the wife for desertion. That offence is not proved by mere separation. The cases I have referred to, and there are others, clearly indicate that a purpose and intention must be attached to the separation before desertion is proved; but if it is proved and found to be continuing the remedy, as in cases of persistent cruelty, is available to the wife. If it were not so, there would be a serious lacuna in the law, for by s. 12 of the Summary Jurisdiction (Married Women) Act, 1895, the Married Women (Maintenance in Case of Desertion) Act is repealed and s. 4 of the Act of 1895 takes its place.

There would be an imperfect remedy for desertion if a deserted wife were debarred from using evidence that might have been of service on another part of the section, and because of the lack of it had to wait two years before the offence was complete. The Act of 1895, like its predecessor, was intended to give a short and summary remedy for desertion to a wife. In my judgment, effect must be given to the words, "whose husband shall have deserted her," not less than to the rest of the section. There was before the justices evidence to which I have already referred, which in my judgment was

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admissible upon the summons before them. They have accepted the wife's statement, and their conclusion upon the facts cannot be set aside by the Court of Appeal. The appeal will be allowed with costs here and in the Divisional Court, and the order of the justices must be restored.

[POLLOCK M.R. stated that Warrington L.J. had read and concurred in the judgment he had just delivered.]

SCRUTTON L.J. A wife on April 10, 1924, took out a summons before the justices under the Summary Jurisdiction (Married Women) Act of 1895 for maintenance, alleging that her husband had wilfully neglected to maintain her. But on it appearing that the acts of cruelty were prior to February 27, 1923, and therefore more than six months before the issue of the summons, she was advised that the proceeding was barred by the time limit in s. 11 of the Summary Jurisdiction Act, 1848: *Ellis* v. *Ellis* (1); *Medway* v. *Medway*. (2) She therefore took out a summons on April 12, 1924, for the same relief, arising from her husband's "desertion" of her, desertion having been held to be a continuing offence to which the time limit did not apply: *Heard* v. *Heard*. (3)

The magistrates heard both wife and husband, and obviously believed the wife. Her evidence established a course of persistent cruelty and drunkenness with statements by the husband that he meant to make it impossible for the wife, so that she should leave him. This class of evidence brings the case within Lord Gorell's judgment in *Sickert* v. *Sickert* (4), where it is explained that a husband who intentionally forces his wife to leave him by adultery and cruelty "deserts" her, though she in fact leaves him—a case sometimes described as "constructive desertion."

The magistrates therefore granted the wife the relief asked. The Divisional Court reversed their decision on the ground, as I understand their judgment, that where desertion is caused by cruelty, the matter complained of is the cruelty

(1) [1896] P. 251.
(2) [1900] P. 141.
(3) [1896] P. 188.
(4) [1899] P. 278.

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before the wife leaves, and proceedings must be taken within six months of the cruelty. They heard the case on June 17 and 19, and the case of *Thomas* v. *Thomas* (1), decided in this Court on January 18, 1924, but not reported till the July (1924) number of the Law Reports, was not cited to them. That case appears to me to decide that desertion, consisting of the wife's departure forced by cruelty, may be a continuing offence not wiped out until the husband shows a genuine and satisfactory repentance of his previous intention to force the wife away.

In some cases it is clear that the facts would show such a continuing intention, as where the husband continues living with a woman in the house, whose presence caused the wife to leave.

But where there was original cruelty and expressed intention to force the wife to leave, I do not think that the fact that there is no cruelty or expressed intention after she leaves prevents the desertion from continuing. The intention is presumed to continue, unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back.

In the present case there was abundant evidence before the magistrates of original intention to force the wife to leave, and no evidence of repentance or inducement to return before the issue of the summons. In such a case in my view the magistrates were justified in finding continued desertion in the sense of a continuous forcing of his wife to live apart, without efforts to recover her, and in such a case, in my opinion, and contrary to the view of the Divisional Court, the time limit did not begin to run from the date of the wife's leaving, but at earliest from the date when the magistrates were satisfied that the original intention was abandoned, and the wife was informed of it in such a way that she should be satisfied as to its genuineness.

The judgments in *Thomas* v. *Thomas* (1) should be a useful guide to magistrates on this point, but they must not ignore the time limit in that class of desertion where the husband

(1) [1924] P. 194.

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forces the wife to leave him, unless they are satisfied that the intention continues. They may be so satisfied, if satisfied of the original intention, unless the husband satisfies them that his acts and declarations from the time of his wife's leaving him to the issue of the summons should have convinced the wife that she might safely return to him. The appeal must be allowed with costs and the order of the magistrates restored.

Appeal allowed.

Solicitors for appellant: *Last, Riches & Fitton.*
Solicitors for respondent: *Wilberforce, Allen & Bryant.*

R. M.

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[IN THE COURT OF APPEAL.]

THE SUSQUEHANNA.

Shipping — Collision — Damages — Loss of Use of Admiralty Oil Tanker — Substitution of stand-by Vessel—Vessels exclusively engaged on Admiralty Service but of Class which are sometimes let on Hire—Basis of Assessment of Damages.

The P., a vessel belonging to the Admiralty and engaged in supplying oil fuel to the fleet, was damaged in a collision with the defendants' steamship. The defendants admitted liability and the damages were referred to the registrar and merchants for assessment. The Admiralty owned a number of oil tankers, some of which they from time to time chartered for commercial purposes, but it was admitted that neither the P., nor the B., which took her place while she was being repaired, would have been chartered. The registrar awarded the Admiralty in respect of loss of use of the P. during the thirty-two days occupied by the repairs a sum based on her commercial value if she had been let on hire—namely, 200*l.* per diem:—

Held, confirming the decision of the President, that the registrar had adopted a wrong basis of assessment, and that the case must be remitted to him for reconsideration on the basis of the actual loss suffered by the Admiralty in being deprived of the use of the vessel. While laying down no rule of general application, the considerations to be taken into account should include value and cost of maintenance, and the fact also that the Admiralty kept up stand-by vessels, one of which had to be substituted for the damaged vessel.

APPEAL from a decision of the President (Lord Merrivale)

referring back a report of the registrar for reassessment of one of the items in a claim for damages.

The appellants (plaintiffs) were the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom (hereinafter referred to as the Admiralty). The respondents (defendants) were the owners of the steamship *Susquehanna*. The action arose out of a collision on November 29, 1920, at Danzig, between the *Susquehanna* and the R.F.A. *Prestol*, an Admiralty oil tank vessel engaged in the supply of oil fuel to the fleet. The defendants admitted liability for the collision and the damages were referred to the registrar and merchants for assessment. The only item in dispute was the amount to be allowed as damages for the detention of the *Prestol* for thirty-two days, the time during which it was admitted she was detained in dock for repairs. The Admiralty claimed 7200*l.* under the heading of "loss of use."

The facts were that in consequence of the collision the *Prestol* had been brought from Danzig to Rosyth to be repaired and had been replaced by another oiler, the *Belgol*, from the Clyde. The capital value of the *Prestol* was 160,000*l.*; her yearly cost of maintenance and repair was at the rate of 4500*l.*, and the estimated cost of insurance at the current rates 12,000*l.* per annum. It was also in evidence that there was a demand in the mercantile marine for the use on hire of vessels such as the *Prestol* and the *Belgol* at high rates, and the Admiralty claimed damages at the current rates of hire, which they alleged to be 225*l.* per diem for a vessel like the *Prestol*. But it was admitted that if the collision had not occurred neither the *Prestol* nor the *Belgol* would have been let on hire; both would have continued their service to vessels of the fleet.

The registrar awarded 6400*l.* for the loss of use of the *Prestol*. In the "reasons" for his report he said: "There is clear evidence that such a vessel as the *Prestol* has a commercial value and that she could be profitably chartered, if not in use by the Admiralty, who in fact from time to time do charter some of their oilers. Again, instead of hiring

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a vessel for the supply and carriage of oil the Admiralty have their own fleet, and the commercial value of any one of them appears to be a sound basis on which to base an award of damages for loss of time. The fact that no actual loss of freight to the plaintiffs is proved is not now material, having regard to the law as laid down in *The Marpessa* (1) and other cases, and the question is reduced to one as to whether there is evidence on which a sum for damages for loss of time can be awarded. The proof of capital value from which an assumed loss of interest for a particular time follows is not a legal rule but a method of proof only, and in the circumstances of the present case, as in others, in which a claim for damages has been assessed in this manner, the commercial value of the vessel appears to be reasonable evidence on which to make an award of damages."

According to the evidence of the plaintiffs themselves, however, 74*s.* per ton per month could have been obtained on time charter on the *Prestol*, an amount which was 1*s.* per ton less than the rate which the plaintiffs claimed, and having regard to this, and also to the fact that an allowance had to be made on the ground that while the vessel was in dock she was running no risks, the registrar allowed 200*l.* per diem instead of the 225*l.* claimed.

The defendants moved in objection to the report on the ground that the registrar was wrong, having regard to the fact that neither the *Prestol* nor the *Belgol* would under any circumstances have been let on hire, in awarding the Admiralty damages based on the commercial value of the vessels; and they contended that the Admiralty should only receive 5 per cent. on the capital value plus maintenance and insurance, which worked out at 68*l.* per diem.

THE PRESIDENT, in a considered judgment, after stating the above facts, continued as follows:—

It is to be observed that in the particulars of claim no allegation is made of a specific pecuniary loss. The claim is for general damages. The question of principle which

(1) [1907] A. C. 241.

is raised by the appeal is whether, in respect of a vessel withdrawn by reason of a collision from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit. The question here is whether an effective determination of an owner not to employ his vessel in a particular line of profitable service must be held to preclude him, while the vessel is otherwise employed, from a claim for damages for loss of hire.

In *The Argentino* (1) the Court of Appeal by a judgment of Bowen L.J. laid down, and the House of Lords confirmed, as the measure of damages recoverable in cases of collision at sea, the common law measure, that is to say (quoting the words of Bowen L.J.) "such damages as are produced immediately and naturally by the act complained of." The litigation there related however to a claim for deprivation of the use of a freight earning ship and the learned Lord Justice used also these words, "the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her." The form of the question so propounded is, of course, inapplicable in the case of vessels not employed for commercial use. In later cases, and especially *The Greta Holme* (2) and *The Mediana* (3), the House of Lords upon successive occasions has plainly laid down that the common law rule as to damages is of general application and has explained the mode of its operation in cases such as that now under consideration. The *Greta Holme*, a dredger belonging to the Mersey Docks and Harbour Board, was disabled for a period of upwards of fifteen weeks by collision due to negligence. Her owners could have let

(1) (1888) 13 P. D. 191, 201; 14 App. Cas. 519.

(2) [1897] A. C. 596, 602.

(3) [1900] A. C. 113.

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her on hire for 100*l.* a week, but they required her for the performance of their duties in maintaining the water way under their care and would not have let her for any part of the time during which she was disabled. Nevertheless they were held by the House of Lords to be entitled to recover damages for their loss of her use. Lord Halsbury applied the principle of the common law in these terms: "This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrongdoer." Lord Herschell pointed out, too, that the money invested in the dredger was out of the pockets of her owners and that they were deprived of the use of the dredger to obtain which they had sacrificed the interest on the money spent in its purchase. A sum equivalent to this, he said, they must surely be entitled to, and he concurred in the opinions of the Lord Chancellor and of Lord Watson that the Board might also recover general damages in respect of delay and prejudice caused to them in carrying out the works entrusted to them. It is to be observed that the House of Lords at the request of the parties assessed the damages proper to be paid to the owners in respect of their loss of the use of the dredger. The assessment was not made at the sum which could (but would not) have been earned by letting the dredger for hire, but at a round figure of quite different amount. Hire at 100*l.* a week for the time during which the use of the dredger was lost would have produced to the owners a sum of at least 1500*l.* The round figure at which the House of Lords assessed their damage sustained by loss of her use was 500*l.*

The Mediana (1) was the case of a lightship of the Mersey Docks and Harbour Board damaged by collision, and during the period required for repairs—she being one of a fleet of five regularly on service—replaced for seventy-five days by

(1) [1900] A. C. 113.

a sixth vessel of the same owners which they kept for emergencies at a cost of 1000*l.* a year. The plaintiffs claimed and recovered damages at the rate of four guineas a day. It is, I think, worth while to observe that Lord Halsbury L.C., who moved the judgment of the House of Lords, dwelt upon the distinction between special and general damages and pointed out that while owners who are temporarily deprived wrongfully of a ship have a right, in case they have thereby suffered a specific loss, to recover the amount of such loss, if they can establish no specific loss their right is to recover whatever is thought, by the tribunal assessing their damages, to be " the proper equivalent for the withdrawal of the subject matter then in question." Lord Shand concurred, and said that if the Board had hired a ship they must have recovered the sum paid as hire, and on analogous grounds they ought to recover the proper proportion of the expense of the ship they kept ready for emergencies. All their Lordships were of opinion that the amount of the damages to be paid must be assessed upon consideration of the loss or deprivation which was actually suffered.

In *The Valeria* (1), the judgments I have instanced were applied and their dependence upon the principle enunciated in the case of *The Argentino* (2) was affirmed. This case was one of collision, whereby the Admiralty were temporarily deprived of the services of a trading steamer which they had on hire during the war. The cost of the vessel to the Admiralty under her terms of hire for the period of the disablement was 2562*l.* They were, however, employing her at the time of the collision as a trading vessel to carry cargoes for which freight was paid by shippers of goods, and the freight which would have been derived from her trading —the sum the Admiralty in fact lost by reason of the ship's detention—was 1168*l.* It was this lesser sum which, affirming the judgment of the Court of Appeal, the House of Lords held to be the true amount of the damages for loss of use of the ship. Inasmuch as what was in question was interruption of a commercial undertaking, *The Valeria* (1) has only

(1) [1922] 2 A. C. 242, 248. (2) 14 App. Cas. 519.

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an indirect relation to the question now under consideration. Lord Dunedin, however, defined anew the rule which governs the assessment of damages in collision cases, using these words: "The true method of expression I think is that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him."

What appears on consideration of the authorities I have mentioned is, I think, that the damage and loss in respect of which compensation is to be recovered in a case like the present are actual damage and loss and not such as can only be called hypothetical or supposititious. Moreover, the amount to be awarded does not depend upon a mechanical process which would give an identical measure of compensation in cases differing in their elements, but upon a fair assessment of what is in truth and fact the monetary equivalent of the damage which has been the direct outcome of the wrong suffered. No doubt the result must be that the amount of damage to be awarded in respect of the detention of vessels identically alike by means of causes of damage identically alike, will differ according to the circumstances in which the damage is done. Interruption of the employment of the same ship for a given period of time may produce widely differing awards of damages, according to the character of her employment at the time in question. Prevention of the completion of the holiday cruise of an owner in a vessel of his own may give a very different right of compensation to that given by prevention of the continuance of a profitable employment of the same vessel—just as in an ordinary common law action for damages a highly skilled medical missionary wrongfully detained from his benevolent activities might be awarded damages on a different scale from those which would result from the wrongful detention from work of a professional man of like abilities engaged in a lucrative practice. What justice requires in the case of a money claim for pecuniary loss appears to be that the actual pecuniary loss shall be compensated.

In the present case that which the Admiralty lost by the *Prestol's* disablement was thirty-two days' use of a vessel of a capital value of 160,000*l.*, which they kept fit for service at a large annual cost, as a fleet oil ship. These facts form substantial elements in their claim for damages. Any services which were unperformed or were inadequately performed by reason of the *Prestol's* withdrawal must also be considered. If the substitution of the *Belgol* completely supplied the gap caused by the absence of the *Prestol* a question necessary to be answered may be what was the value to the Admiralty of the services of the *Belgol* lost to them by her performance of the duties of the *Prestol*. The *Belgol*, like the *Prestol*, however, would not have been let on hire. As to neither vessel is it possible to determine the actual loss caused to the Admiralty by ascertaining the sum which one or other could have earned if she could have been let on hire. It is worth while perhaps to point out further that at a time of extreme activity in shipping such a letting might be highly profitable, while at a time of depression it might be wholly unremunerative, and that neither scale of earnings would necessarily show what was in fact lost to the Admiralty.

I purposely express no opinion as to the figure named in the award, but for the reasons I have indicated I refer back the report for reassessment of the damages of the plaintiffs by reason of their loss of use of the *Prestol*. Costs reserved.

The Admiralty appealed.

W. N. Raeburn K.C. and *Balloch* (*Sir Douglas Hogg A.-G.* with them) for the appellants. The *Prestol* was a vessel designed and fitted for the carriage of oil and was suitable for commercial use; and the registrar found upon sufficient evidence that the value of the use of the vessel during the time she was being repaired was 200*l.* per diem. The point is similar to that which confronted the registrar in *The Marpessa* (1) and in the earlier cases of *The Greta Holme* (2) and *The Mediana* (3)—namely, to what damages are plaintiffs

(1) [1907] A. C. 241. (2) [1897] A. C. 596.
(3) [1900] A. C. 113.

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entitled for loss of use of a vessel not actually engaged in a profit earning capacity ? The tribunal must assess what they have actually lost : *The Argentino* (1) ; *The Chekiang*. (2)

[ATKIN L.J. The decision of this Court in *The Chekiang* (2) was given after the President's judgment in the present case.]

All these cases show that although not engaged in commercial profit making concerns the owners of the damaged vessel are entitled to substantial and not merely nominal damages in respect of loss of use. The registrar has an extremely difficult task under these circumstances, but in the present case he had the best evidence of what the Admiralty lost, inasmuch as these oil ships are from time to time let out to the commercial world. The Admiralty have two courses open to them. They can have just sufficient oilers to do their work, and if one of them is incapacitated they can hire another, or they must have stand-by vessels. In the former case clearly they would be entitled to recover from the wrongdoers the cost of chartering the substituted vessel. In the latter, which is the present case, they are equally entitled to recover that cost, for they have locked up a large sum of money in these stand-by vessels, and, as they save the Admiralty from having to hire, they are in fact profitable, and the current rate of hire represents the loss which the Admiralty have sustained.

As regards the cases relied on by the respondents, in *The Bodlewell* (3) the vessel was in fact working at a loss, and in *The City of Peking* (4), in which it is difficult to ascertain the precise facts, it would seem that by reshuffling the sailings of their fleet the owners of the injured vessel in fact suffered no loss at all by reason of her detention. *The Valeria* (5), referred to by the President, was concerned with commercial undertakings and has no direct bearing on the present question ; and in *The San Gregorio* (6) the shipping controller was running the oil tanker for profit and the point now before the Court was not argued, the appeal being

(1) 13 P. D. 191 ; 14 App. Cas. 519.
(2) Ante, p. 80.
(3) [1907] P. 286.
(4) (1889) 15 App. Cas. 438.
(5) [1922] 2 A. C. 242.
(6) (1922) 12 Ll. L. Rep. 22, 249.

confined to the question of the deduction of the cost of insurance.

It is admitted that the Admiralty would not in fact have chartered at commercial rates the *Prestol* or the *Belgol* which replaced her; but on the true reading of the registrar's "reasons" for his report he has merely taken the commercial value of the vessel as evidence of the loss sustained. In cases such as *The Marpessa* (1) interest on capital value had to be given, because there was no actual evidence at all of what the claimants had lost.

Dunlop K.C. and *Stenham* for the respondents were not called on.

BANKES L.J. Mr. Raeburn has pointed out what a difficulty this and similar cases of assessment must and do place the registrar in. I entirely sympathise with the registrar's difficulties, but at the same time I think that we cannot interfere with the view taken by the learned President of the reason given by the registrar for his decision.

The claim here was for damages for the detention of this Admiralty oil tanker during the time that she was incapacitated from service by reason of the defendants' negligence. The matter of the proper measure of damages under such circumstances has been much discussed, and several cases have been taken as far as the House of Lords, and to those cases, or some of them, we have been referred. The main result of the decisions is that the wrongdoer is not entitled to get off scatheless merely by reason of his being able to prove that the vessel which he has injured is either a Government warship, or a ship the property of some public authority and not used in making commercial profit. But when the question comes to be discussed as to what the proper measure of damage in such cases ought to be, I do not think that any rule can be extracted from those cases except that the ordinary rule of damages in a common law action applies, and that the wrongdoer is not entitled to say that the question being one of a claim for general damages, those damages must be

(1) [1907] A. C. 241.

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nominal; and that each case must be considered upon its own particular facts. To use Lord Halsbury's language in *The Mediana* (1) the registrar and merchants sitting as a jury must, as best they can, estimate what is to be the proper equivalent for the withdrawal from service of the subject matter in question. In assessing those damages the registrar and merchants are not in the position of a jury only. They are both judge and jury, and they must direct themselves properly as to what the permissible measure of damages may be before they proceed to estimate the amount. Here the learned registrar (whether he intended it or not I am not sure) certainly, in my opinion, has expressed the view that in a case of this kind, where the claim is one by the Admiralty for injury to a Government ship which would not, under any circumstances, have been let out on charter, or been made use of in order to earn a commercial profit for the time that she was incapacitated, the commercial value of such a ship, i.e., what such a ship in the hands of a private owner would earn if let out on charter, is by itself, without more, a sound basis on which to award damages for the loss of time. With great respect to the learned registrar, I cannot accept that as a correct direction to himself as the basis (to use his own expression) upon which to ascertain the quantum in this particular case.

What the learned President has said with regard to the matter is this. He said: "It is to be observed that in the particulars of claim, no allegation is made of a specific pecuniary loss. The claim is for general damages. The question of principle which is raised by the appeal is whether, in respect of a vessel withdrawn, by reason of a collision, from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit. The question here is whether an effective determination of an owner not to

(1) [1900] A. C. 113.

employ his vessel in a particular line of profitable service, must be held to preclude him, while the vessel is otherwise employed, from a claim from damages for loss of hire." If I understand the learned President's proposition accurately, it is this, that where evidence is given before the registrar of what a vessel of the class in question might earn upon charter in the hands of an owner who made a profit out of her by chartering, and at the same time there is evidence before the registrar that the vessel is owned, or in the hands of a person who, under no circumstances, would have consented to charter the vessel for the suggested rate of freight, or for any rate of freight, and would not have parted with possession of her for a moment under any circumstances, it is not open to the registrar to consider that the commercial basis, as he expressed it, is any longer an indication to him of the damages which this particular owner is entitled to recover. I agree with that view, but at the same time it must not be taken that the damages must therefore be nominal and that there are not other considerations which the registrar may properly take into account; a number of admissible considerations have been referred to in the cases to which our attention has been called, and others might be added where, as here, stand-by vessels are provided in order to deal with an emergency. I am not endeavouring to lay down a rule or to suggest to the registrar that there is any universal rule; all I need say, I think, is, that I cannot differ from the view of the President that, in this particular case, it was not open to the registrar to accept as the basis upon which he measured the damages, what he calls the commercial value of a vessel of this class. For these reasons I think the appeal fails, and should be dismissed with costs.

SCRUTTON L.J. I remain of the opinion which I expressed in *The San Gregorio* (1) that this Court should be very slow to interfere with a decision of the registrar and merchants, among other things for the reason that the merchants bring

(1) 12 Ll. L. Rep. 249.

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evidence and knowledge which is not in evidence on shorthand notes and which is one of the grounds for the decision of the Court. But there may be cases where the registrar has acted on a wrong principle. The present case is one where the Admiralty have in the Baltic an oil tanker supplying the fleet they have also in various parts of the world, wherever a British fleet is, a large number of oil tankers, some of them merely stands-by in case a ship is damaged so that she may be replaced. Under those circumstances the *Susquehanna* ran into the oil tanker in the Baltic. The *Susquehanna* was to blame and admitted liability, and the question is how much she has to pay in respect of detention. The oil tanker which was damaged would very shortly have come home to get a fresh cargo of oil and then would have gone back to the Baltic. What she did in fact was to come home and spend a month or so in being repaired at Rosyth and then go back to the Baltic. No claim was made for the period of coming home and going back, because she would have come home though for a different purpose, but a claim was made for the period during which she was being repaired at Rosyth, and that was made on this basis. The Admiralty sometimes let or charter their spare oil tankers to the commercial world, and they can do it when they so desire at a named price, and that price, they say, shows the value of the ship. They have lost that value for so many days and they want compensation based upon that commercial value; they do not say for a moment that they would have let this ship, in fact it is quite clear they would not; they would have got her home, filled her, and when the time came, sent her back to the Baltic; but they replaced her by a ship that was in Glasgow. Presumably, though the witness from the accountant's office knows nothing about it, the ship at Glasgow was replaced from somewhere else; whether the ship from somewhere else was also replaced by some other ship or other I do not know; the Court is left in a complete fog as to that part of the case.

The registrar, as I read his judgment, says the commercial value of the ship can be got at by seeing for what sum a ship

could be chartered if the Admiralty were ready to charter, and that the commercial value of any one of them appears to be a sound basis on which to base an amount for damages for loss of time; and he does not seem to have taken into account that in fact there was no probability of that vessel or of the vessel that substituted her at any time being let on a commercial basis. The President has treated the matter as raising a question of principle "whether in respect of a vessel withdrawn by reason of a collision from a particular service, to which service she is at the time in question dedicated by the owner, and in which pecuniary profit is not earned, damages may be assessed against a wrongdoer upon the footing of the profit which the owner might have derived if he had been employing her upon a service productive of pecuniary profit," and he has decided, as I understand, that the judgment of the registrar is based on the principle that damages may be so assessed though the owner of the damaged vessel has no intention of employing her for that purpose. I think, though I have had some doubt about it, that the judgment of the registrar does proceed on the principle which the President states is wrong. I agree, and, therefore, the matter must go back to the registrar for assessment. Again, as I said in *The San Gregorio* (1), I am extremely reluctant to tie the hands of the registrar and merchants too tightly by stating principles when a new set of facts may arise to show we are wrong. I stated the matter in *The San Gregorio* (1) in this way: "What was the value of this ship to the Government and what charges did the Government save by not having this ship running the sea?" That I think is what the plaintiffs have lost, the use of the ship for a time, and the question on those facts is what represents the loss. It cannot be tested by the sum for which the Admiralty could have let the ship if it is clear on the evidence they had not the slightest intention of letting the ship, because they have not lost that. What the registrar will make of it I do not know, but being an experienced registrar he will no doubt express himself in such a way that there will be no further appeal.

(1) 12 Ll. L. Rep. 249, 251.

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ATKIN L.J. I agree. I am not sure that it would be altogether a desirable result that the opinion of the registrar involving a large sum of money should be so expressed that there should be no appeal; this is an instance that shows that where reasons are expressed, there may be, and justly so, proper grounds of appeal. This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book upon the subject. Subject to that, all I need say is that I think that the registrar in this case had laid down a rule for himself which amounts to a misdirection. I need not say more about it, because to my mind the President has expressed the correct criticism upon it, and in respect ot the guidance that is required upon it I for my part find no fault with what was said by the President on a matter which is still to be considered by the registrar and merchants when the question is finally referred back to them. For these reasons I think the present decision was correct and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *The Treasury Solicitor.*
Solicitors for the respondents: *Thomas Cooper & Co.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1925.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1925, will be as follows:—

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